

Responsive Pleadings: Asserting Counterclaims

Key steps counsel should take, and practical and procedural issues counsel should consider, when drafting an answer and counterclaims in response to a complaint in federal district court.

Practical Law Litigation

REVIEW THE RELEVANT RULES

Review the relevant rules and orders that govern responsive pleadings, including:

- The Federal Rules of Civil Procedure (FRCP).
- The district court's local rules.
- The district court's standing orders (if any).
- The judge's individual rules (if any).
- Case-specific orders (if any).

DETERMINE WHETHER THE COUNTERCLAIMS ARE PROPER

- Ensure that each counterclaim is being asserted against an opposing party.
- Confirm that each claim is a counterclaim and not a defense. Counterclaims:
 - may result in an award of relief for the defendant, not just a lack of relief for the plaintiff (FRCP 13(c));
 - may seek relief of a kind different from that which the plaintiff seeks (for example, if the plaintiff sues the defendant for an injunction, the defendant may file a counterclaim for damages) (FRCP 13(c));
 - need not relate to the subject of the plaintiff's complaint (FRCP 13(b));
 - may name other counterclaim defendants in addition to the plaintiff (for example, a counterclaim may assert that the plaintiff and someone who is not yet a party to the action are jointly liable for injuring the defendant, in which case that person is considered a counterclaim

defendant rather than a third-party defendant) (FRCP 13(h)); and

- may survive dismissal of the plaintiff's claim (FRCP 13(i)).

DETERMINE WHETHER THE COUNTERCLAIMS ARE COMPULSORY OR PERMISSIVE

- For each counterclaim, ask whether it arises out of the same transaction or occurrence as the plaintiff's claim. In answering this question, considerations include:
 - the extent to which the legal and factual issues overlap;
 - the evidence necessary to prove each claim;
 - whether there is a logical relationship between the claims; and
 - the extent to which litigating the claims together will promote judicial efficiency.
- Note that if the answer to the above is yes, the counterclaim is compulsory, unless the counterclaim requires adding another party over whom the court cannot obtain personal jurisdiction. If the answer is no, the counterclaim is permissive. (FRCP 13(a)(1), (b).)
- If the counterclaim is compulsory, make sure to plead it in the answer or it will be deemed abandoned. However, a defendant need not plead an otherwise compulsory counterclaim if either:
 - the claim was already the subject of another pending action when the plaintiff commenced the action; or
 - the plaintiff brought an *in rem* or a *quasi in rem* claim that did not establish personal jurisdiction over the defendant

and the defendant does not assert any counterclaims in the action.

(FRCP 13(a)(2).)

- Keep in mind that a permissive counterclaim may be asserted as a claim in a later action (subject to any applicable defense, such as the statute of limitations) (FRCP 13(b)).



Search [Responsive Pleadings: Counterclaims and Crossclaims](#) for more on compulsory and permissive counterclaims.

CONSIDER WHETHER ASSERTING THE COUNTERCLAIMS IS AN APPROPRIATE STRATEGIC MOVE

- Evaluate whether each counterclaim is strong enough to assert, making sure it:
 - has adequate factual and legal support; and
 - is not raised for any improper purpose.
- For each permissive counterclaim, consider:
 - the strength of the counterclaim and any defenses the plaintiff may have against it;
 - how the counterclaim might affect the defendant's defenses to the plaintiff's complaint (including whether asserting counterclaims waives defenses based on lack of personal jurisdiction or improper venue, an issue on which authorities are divided);
 - whether asserting the counterclaim will significantly increase the cost of litigation;
 - whether asserting the counterclaim will increase or decrease the likelihood of settling the litigation (although raising a counterclaim might help induce the plaintiff to settle, expanding the scope of the litigation can make it harder for the parties to reach an agreement);
 - which court offers the best forum for litigating the counterclaim, if there is a choice of forum;
 - how the counterclaim will affect the overall relationship between the parties; and
 - how far the litigation has progressed and whether asserting the counterclaim might delay resolution of the action.

CONFIRM PROPER JURISDICTION AND VENUE

- Make sure the district court has:
 - subject matter jurisdiction over the counterclaims; and
 - personal jurisdiction over the counterclaim defendants.
- Confirm that the venue is appropriate.



Search [Commencing a Federal Lawsuit: Initial Considerations](#) for more on subject matter jurisdiction and personal jurisdiction.

SUBJECT MATTER JURISDICTION

- Note that in almost all cases, the district court has supplemental jurisdiction over a compulsory counterclaim, because it arises out of the same transaction or occurrence as the plaintiff's complaint (28 U.S.C. § 1367(a); FRCP 13(a)).
- Research whether supplemental jurisdiction extends to any permissive counterclaims, and:
 - if so, keep in mind that the district court may nevertheless decline to exercise its supplemental jurisdiction (28 U.S.C. § 1367(c)); or
 - if not, consider whether the district court has an independent basis for subject matter jurisdiction, such as federal question or diversity jurisdiction.

PERSONAL JURISDICTION

Make sure that the district court has personal jurisdiction over each counterclaim defendant (usually, the plaintiff), keeping in mind that:

- For compulsory counterclaims, the plaintiff generally consents to jurisdiction by filing an action in that court.
- For permissive counterclaims, the plaintiff's filing of suit may or may not constitute consent to jurisdiction depending on the particulars of the case (see, for example, *Grupke v. Linda Lori Sportswear, Inc.*, 174 F.R.D. 15, 17-18 (E.D.N.Y. 1997)).

VENUE

- Note that venue is usually assumed to be appropriate because the plaintiff has chosen to litigate in that court.
- Be aware that, in some cases, the court may require the defendant to show that venue is appropriate for each counterclaim. For example, if a contractual forum selection clause in the parties' agreement applies to the counterclaim but not to the plaintiff's original claim, some courts will grant a plaintiff's motion to dismiss the counterclaim for improper venue under FRCP 12(b)(3) (see, for example, *Publicis Comm'n v. True N. Comm'ns Inc.*, 132 F.3d 363, 365-66 (7th Cir. 1997)).

DRAFT THE ANSWER AND COUNTERCLAIMS

- Plead the counterclaims in the defendant's answer to the complaint. An answer containing counterclaims typically includes the following components, in the following order:
 - a caption;
 - an introduction;
 - responses;
 - defenses;
 - counterclaims;
 - a conclusion;



Checklists

Visit [PRACTICAL LAW](#) for a variety of handy action item checklists, timelines, charts of key issues, and flowcharts. These Checklists are continuously maintained by our attorney editors.

- a jury demand (if applicable);
- a signature block; and
- exhibits (if any).
- Ensure that the answer and counterclaims contain:
 - numbered paragraphs; and
 - headings.
 (FRCP 10(b).)
- Redact personal information so that the answer discloses only:
 - the last four digits of an individual's social security number or taxpayer identification number;
 - the year (but not the month and date) of an individual's birth;
 - the initials (rather than the name) of a minor; and
 - the last four digits of a financial account number.
 (FRCP 5.2(a).)



Search [Responsive Pleadings: Answering the Complaint](#) and [Responsive Pleadings: Counterclaims and Crossclaims](#) for more on drafting the various sections of the answer and counterclaims.

Search [General Formatting Rules in Federal District Court](#) for more on properly formatting litigation documents.

CAPTION

Include in the caption:

- The court's name.
- The docket number.
- The title of the case.
- The document title, including an indication that the answer contains affirmative claims (for example, "Answer and Counterclaims" or "Answer, Counterclaims, and Crossclaims").
- A jury demand (if applicable).
- Any other information required by the court's local rules or the judge's individual rules.

INTRODUCTION

- Provide a brief overview of the defendant's theory of the case and its claims. Answers and counterclaims often begin with an introduction section containing this information.
- Alternatively, consider whether it would be helpful to include a preliminary statement at the beginning of the counterclaims section.

RESPONSES

Respond to each allegation in the complaint with one or more of the following:

- An admission.
- A denial.
- A statement of lack of knowledge or information sufficient to form a belief as to the allegation's truth.

(FRCP 8(b).)

DEFENSES

- Plead any defenses to the plaintiff's claims that the defendant wants to assert in the action.
- Make sure to plead with particularity any affirmative defenses under FRCP 9(b).

BODY OF THE COUNTERCLAIMS SECTION

- Make sure to include the same basic sections and contents as a complaint (for more information, search [Commencing a Federal Lawsuit: Drafting the Complaint](#) on Practical Law). In particular, the counterclaims section should contain:
 - a statement of the court's subject matter jurisdiction over the counterclaim;
 - a statement of venue for the counterclaim;
 - a description of the parties, if necessary to correct what the defendant thinks are material errors or omissions in the complaint's description of them or introduce any additional defendants on the counterclaim;
 - the relevant facts supporting the counterclaim; and
 - the defendant's legal claims, in numbered paragraphs and separated by appropriate headings (FRCP 10(b)).
- Keep in mind that the defendant may incorporate by reference, rather than repeat:
 - allegations in the complaint with which it agrees; or
 - averments of fact found elsewhere in the answer.
 (FRCP 10(c).)
- Note that counterclaims are subject to the same pleading standards as claims in a complaint (FRCP 8(a)). Most significantly, the defendant must:
 - plead enough facts to state a claim for relief that is facially plausible (see, for example, *E.I. du Pont de Nemours & Co. v. Kolon Indus., Inc.*, 637 F.3d 435, 440 (4th Cir. 2011));
 - plead with particularity any counterclaims alleging fraud or mistake (FRCP 9(b)); and
 - specifically state any special damages (FRCP 9(g)).

CONCLUSION

- Include a prayer for relief stating what affirmative relief the defendant would like the court to grant (FRCP 8(a)(3)).
- Make sure to state the relief sought for each counterclaim asserted.

JURY DEMAND

If demanding a jury trial, consider whether the court requires jury demands to appear:

- In the caption, as is normal practice.
- At the end of the answer.

SIGNATURE BLOCK

- Ensure that the signature block, which appears at the end of the answer, includes at least one attorney of record's:

- name;
- address;
- email address; and
- telephone number.

(FRCP 11(a).)

- Check the district court's local rules for additional requirements.

EXHIBITS

- Consider whether to attach any documents as exhibits to the answer and counterclaims.
- Note that exhibits become part of the answer for all purposes (FRCP 10(c)).

DRAFT THE ACCOMPANYING DOCUMENTS

- Prepare and file a corporate disclosure statement under FRCP 7.1, if the service and filing of the answer is the defendant's first appearance in the action and the defendant is a non-governmental corporate party (for more information, search [Rule 7.1 Disclosure Statement](#) on Practical Law).
- Prepare a summons, if the defendant is joining additional counterclaim defendants (for more information, search [Commencing a Federal Lawsuit: Drafting the Complaint](#) on Practical Law).

SERVE AND FILE THE ANSWER AND COUNTERCLAIMS

- Keep in mind that asserting counterclaims does not change the time for answering the complaint. An answer is commonly due within 21 days after the defendant is served with the complaint, but there are situations in which the deadline is 60 days or 90 days after a certain event (for more information, search [Responsive Pleadings: Answering the Complaint](#) and [Computing and Extending Time in Federal Litigation](#) on Practical Law).
- Note that the defendant usually serves an answer containing counterclaims on the plaintiff in the same manner as it would serve an answer without counterclaims.
- Be aware that some courts require any pleading asserting new claims to be served and filed in paper format rather than through the court's Case Management/Electronic Case Filing (CM/ECF) system, even if an answer would otherwise be served and filed electronically.
- Make sure to serve process, if the defendant is adding counterclaim defendants who are not yet parties to the action.

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