RULE 13. COUNTERCLAIM AND CROSS-CLAIM

(a) Compulsory Counterclaims.

(1) *Pleadings.* Unless otherwise specifically provided by statute or unless the relief demanded in the opposing party's claim is for damage arising out of the ownership, maintenance or control of a motor vehicle by the pleader, a pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim, and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction. But the pleader need not state the claim if (A) at the time the action was commenced the claim was the subject of another pending action, or (B) the opposing party brought suit upon the claim by attachment or other process by which the court did not acquire jurisdiction to render a personal judgment on that claim, and the pleader is not stating any counterclaim under this Rule 13.

(2) *Removal of Claims Not Within the Subject-Matter Jurisdiction of the District Court.* If a compulsory counterclaim filed in the District Court is not within the subject-matter jurisdiction of that court, the pleader shall simultaneously file and serve notice of removal and pay the required removal fee under Rule 54A, and the action shall be removed to the Superior Court as provided in that rule.

(b) Permissive Counterclaims. A pleading may state as a counterclaim any claim against an opposing party that is within the subject-matter jurisdiction of the court.

(c) Counterclaim Exceeding Opposing Claim. A counterclaim may or may not diminish or defeat the recovery sought by the opposing party. It may claim relief exceeding in amount or different in kind from that sought in the pleading of the opposing party.

(d) Counterclaim Against the State. These rules shall not be construed to enlarge beyond the limits now fixed by law the right to assert counterclaims or to claim credits against the State of Maine or an officer or agency thereof.

(e) Counterclaim Maturing or Acquired After Pleading. A claim which either matured or was acquired by the pleader after serving a pleading may, with

the permission of the court, be presented as a counterclaim by supplemental pleading.

(f) Omitted Counterclaim. When a pleader fails to set up a counterclaim through oversight, inadvertence, or excusable neglect, or when justice requires, the pleader may by leave of court set up the counterclaim by amendment.

(g) Cross-Claim Against Co-party. A pleading may state as a cross-claim any claim by one party against a co-party that is within the subject-matter jurisdiction of the court and arises out of the transaction or occurrence that is the subject matter either of the original action or of a counterclaim therein or relating to any property that is the subject matter of the original action. Such cross-claim may include a claim that the party against whom it is asserted is or may be liable to the cross-claimant for all or part of a claim asserted in the action against the cross-claimant.

(h) Joinder of Additional Parties. Persons other than those made parties to the original action may be made parties to a counterclaim or cross-claim in accordance with the provisions of Rules 19 and 20.

(i) Separate Trials; Separate Judgment. If the court orders separate trials as provided in Rule 42(b), judgment on a counterclaim or cross-claim may be rendered in accordance with the terms of Rule 54(b) even if the claims of the opposing party have been dismissed or otherwise disposed of.

Advisory Committee's Notes
December 4, 2001

Rule 13(j) requires that when an action is removed from the District to the Superior Court, permissive counterclaims and cross-claims are permitted as if filed in an original action in the Superior Court and the clerk "shall forthwith notify all parties of the requirements of this subdivision." The subdivision is an amended vestige of the days in which compulsory counterclaims were not allowed in the District Court. The subdivision has no purpose in a unified court and imposes a meaningless burden on the clerks. Under current practice, when an action is removed to the Superior Court, the entire action is removed, including counterclaims and cross-claims.

Advisory Committee's Notes
May 1, 2000

Subdivision (a)(2) is amended to correct the reference to the rule specifying payment of a removal fee and to indicate that the subject fee is one that involves removal.

Advisory Committee's Note
December 31, 1967

District Court Civil Rule 73(a) at present provides for trial de novo upon an appeal to the Superior Court from a default judgment in the District Court. Simultaneously with the deletion of that provision, former Rule 13(k) is amended to eliminate the compulsory counterclaim in the Superior Court in such cases. *See* the Advisory Committee's Note to the amendment of District Court Civil Rule 73(a). Thus, in any District Court case which goes to judgment, there is no compulsory counterclaim on appeal to the Superior Court. The defendant in the District Court is subject, however, to the same dangers of collateral estoppel as are present in the Superior Court on claims arising out of the same transaction or occurrence as the plaintiff's claim. The defendant's protection is to plead his claim as a permissive counterclaim in the District Court under District Court Rule 13(a) or, if his claim exceeds the jurisdictional limit of the District Court, to remove the action to the Superior Court where he can assert the counterclaim.

Since municipal courts and trial justices have been superseded by the District Court, former Rule 13(j) is deleted and former Rule 13(k) is renumbered Rule 13(j).

Explanation of Amendments
September 1, 1960; August 1, 1962; November 1, 1966
Rules 13(a) and (b)

The amendment of September 1, 1960, modified M.R.C.P. 13(a) by eliminating the compulsory counterclaim requirement in cases where the claim arises out of a motor vehicle accident. Prior to the amendment any defendant who had a claim against the plaintiff arising out of the same transaction or occurrence as the plaintiff's claim was required to interpose it as a counterclaim or be precluded from recovery upon it. A later independent action would not lie.

The objective of Rule 13(a) as originally promulgated was to avoid the possibility of two trials on the same facts and the further possibility of the defendant's inadvertent loss of his own claim by reason of the adverse

determination in the first trial of facts essential to that claim. Desirable though that objective may be conceded to be, the rule did not work satisfactorily in motor vehicle actions in which, as is usually the case, the defendant carried liability insurance.

Under the terms of its policy, the insurer controls the defense of such actions. Counsel for the insurer properly felt obligated to notify the assured of the compulsory counterclaim rule, with the likely result that the assured would request him to handle the counterclaim. If counsel acceded to the request, it caused resentment on the part of the "plaintiff bar" that a member of the "defendant bar" had pre-empted law business which he would not have had under the prior practice where an independent action was required. This resentment was particularly serious in the mind of the attorney who by reason of former representation of the assured in other matters looked upon him as a regular client. Moreover, when the same lawyer was charged with protecting both the interests of the insurance company in defending a claim and the interests of the assured in asserting a claim, problems of conflict of interest would naturally arise. On the other hand, if the insurer's counsel told the assured that he must retain his own lawyer for the prosecution of the counterclaim, the assured found it hard to understand why two lawyers were necessary to do the work of one. The layman's reaction was likely to be adverse both to the insurer's attorney and the legal profession generally.

Criticism of the rule was statewide and came both from lawyers who habitually represented plaintiffs and those who habitually represented insurance companies. After several months of experience with the rule, the Supreme Judicial Court concluded that there was sufficient merit to this criticism to warrant the elimination of the compulsory counterclaim requirement in these cases. Since the complaints evoked by the rule involved motor vehicle cases, the Court limited the amendment to this type of case.

As a matter of drafting, the operative words of the exception were taken from the standard form of automobile liability insurance policy. It is to be noted that it is only when the original claim is against the owner or operator of a motor vehicle that the counterclaim is no longer compulsory. For instance, if action is brought against a railroad for a grade crossing accident, any claim the railroad may have for damage to its locomotive is still compulsory. Here the problem of double representation of insurer and assured, with the attendant serious problems of conflict of interest, would not commonly exist.

The bar should note that this amendment restores the possibility, adverted to above, that a defendant may lose his own claim because of the adverse determination in an action against him, very likely defended by counsel retained by his insurer, of an issue decisive of liability in his potential plaintiff claim. This results from the application of that branch of the doctrine of res judicata properly denominated collateral estoppel. The principle of collateral estoppel is recognized in Maine by a long line of decisions. *See Cianchette v. Verrier*, 155 Me. 74, 85 ff., 151 A.2d 502, 508 ff. (1959). In that case, the Court quotes with approval the succinct statement of the rule set forth in the Restatement of Judgments as follows:

> "Where a question of fact essential to the judgment is actually litigated and determined by a valid and final judgment, the determination is conclusive between the parties in a subsequent action on a different cause of action, except as stated in sections 69, 71 and 72." Restatement of Judgments, § 68(1).

The hazards of collateral estoppel can be minimized, assuming separate actions are brought, by having them consolidated for trial pursuant to Rule 42(a). This may be done even if the actions are pending in different counties. See Section 42.2 of the text. A further possibility is for the defendant to file a permissive counterclaim in the same action. A literal reading of Rule 13(b), prior to the amendment effective August 1, 1962, might lead to the conclusion that a counterclaim in an automobile accident case was not even permissive, since it was not a claim "not arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim." However, the Superior Court adopted the practical construction that any counterclaim which was not compulsory was permissive, and the August 1, 1962, amendment of Rule 13(b) has eliminated any doubt as to the correctness of that view.

The 1966 amendment at the end of Rule 13(a) was taken from a 1963 amendment to F.R. 13(a). It exempts from the compulsory counterclaim requirement a suit brought by attachment or trustee process where the court does not acquire personal jurisdiction and the defendant chooses to come in to defend his interest in the property. If, however, the defendant does elect to assert any counterclaim, he is required to assert any other counterclaim which is compulsory within the meaning of Rule 13(a).

Rule 13(h)

The amendment of Rule 13(h) was taken from a 1966 amendment to F.R. 13(h). It clarifies by explicit reference to amended Rules 19 and 20 the circumstances under which additional parties to a counterclaim or cross-claim may be brought into the action.

Rule 13(k)[***]

In connection with the promulgation of the Maine District Court Rules, Rule 13(k) was added to the Maine Rules of Civil Procedure, effective August 1, 1962. Rule 13(k) requires a defendant to plead counterclaims made compulsory by Rule 13(a) in any action commenced in the District Court after they are removed or appealed (after default judgment)*** to the Superior Court. Rule 13(k), applicable to actions commenced in the District Court, differs from Rule 13(j), applicable to actions commenced in a municipal court. Since there is no trial de novo on appeal from a judgment of the District Court entered otherwise than by default [see District Court Rule 73(a)], there is no compulsory counterclaim when the plaintiff or the non-defaulting defendant appeals to the Superior Court. The defendant is subject, however, to the same dangers of collateral estoppel as are present in the Superior Court on claims arising out of the same transaction or occurrence as the plaintiff's claim. The defendant's protection is to plead his claim as a permissive counterclaim in the District Court under District Court Rule 13(a) or, if his claim exceeds the jurisdictional limit of the District Court, to remove the action to the Superior Court where he can assert the counterclaim.

Reporter's Notes
December 1, 1959

This rule is substantially the same as Federal Rule 13. Rule 13(a) is wholly new to Maine practice. A defendant who has a claim against the plaintiff arising out of the same transaction or occurrence as the plaintiff's claim must interpose it

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[***] [Field, McKusick & Wroth commented: "Now subdivision (j) by virtue of a December 31, 1967 amendment, which also eliminated the reference to an appeal from a default judgment." 1 Field, McKusick & Wroth, *Maine Civil Practice* at 265.]

as a counterclaim or he will be precluded from recovery upon it.* A later independent action will not lie. The danger of being thus foreclosed from a valid claim is minimized somewhat by subdivision (f) of the rule, which gives the court discretion to allow an omitted counterclaim to be set up by amendment. Furthermore, the official form of summons (Form 1 in the Appendix of Forms) contains a specific statement to warn the defendant of the consequences of failure to assert a counterclaim arising out of the same transaction or occurrence. It is to be further noted that a defendant defaulted for failure to answer is not within the language of Rule 13(a), since he has not served a pleading. Such a defendant is therefore free to bring a new action upon a counterclaim which would ordinarily be compulsory.

The "unless" clause at the outset of Rule 13(a) is not in the federal rule. It is added in order to take care of the rare situation arising under R.S.1954, Chap. 172, Sec. 51, as amended in 1959 [now 14 M.R.S.A. § 6654] (proceedings at law to try title), where the application of a compulsory counterclaim rule would defeat the statutory objective.

Rule 13(b) broadens existing practice by permitting any claim which the pleader has against an opposing party to be stated as a counterclaim, even though it is factually unrelated to the main claim, and whether or not it is for a liquidated sum or one ascertainable by calculation. This removes the present restrictions on setoff, R.S.1954, Chap. 113, Sec. 76 (amended in 1959), and also changes the common law of recoupment. *Ruggles Lightning Rod Co. v. Ayer,* 124 Me. 17, 125 A. 144 (1924) (recoupment denied where the claim was founded upon an independent and distinct transaction).

Rule 13(c) allows the defendant an affirmative judgment if his recovery on the counterclaim exceeds that of the plaintiff.

Rule 13(g) provides for cross-claims. A cross claim must be distinguished from a counterclaim. The latter is a claim against the opposite party, and the cross-claim is a claim against another party on the same side of the case. A cross-claim

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* [Field, McKusick & Wroth commented: "By virtue of a Sept. 1, 1969 amendment this requirement does not apply in motor vehicle cases. *See* Explanation of Amendments." 1 Field, McKusick & Wroth, *Maine Civil Practice* at 261.]

is never compulsory, and it is permissible when it arises out of the same transaction as the original action or a counterclaim therein or relates to property that is the subject matter of the original action.

Rule 13(j) is not in the federal rule. It deals with compulsory counterclaims in actions appealed or removed from a municipal court or trial justice.[**]** There is no requirement for such counterclaims in the lower courts because such a large portion of the defendants appear without counsel that a compulsory counterclaim rule might cause undue hardship. When such an action reaches the Superior Court, however, Rule 13(a) becomes applicable and a counterclaim compulsory under that subdivision must be asserted by amendment to the answer. As a further precaution in such cases, the rule provides that upon entry of such an action in the Superior Court the clerk shall notify the parties of this requirement.

[**] [Field, McKusick & Wroth commented: "Former subdivision (j) was deleted and the present subdivision (j), dealing with removals from the District Court, was added in amendments effective Aug. 1, 1962, and Dec. 31, 1967. *See* Explanation of Amendments and Advisory Committee's Note." 1 Field, McKusick & Wroth, *Maine Civil Practice* at 262.]