

2001 DRAFTING REQUEST

Bill

Received: 01/23/2001

Received By: nelsorp1

Wanted: As time permits

Identical to LRB:

For: Sheryl Albers (608) 266-8531

By/Representing:

This file may be shown to any legislator: NO

Drafter: nelsorp1

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Alt. Drafters:

Subject: Courts - civil procedure

Extra Copies:

Pre Topic:

No specific pre topic given

Topic:

Compulsory counterclaims

Instructions:

See Attached 99-4178

Drafting History:

<u>Vers.</u>	<u>Drafted</u>	<u>Reviewed</u>	<u>Typed</u>	<u>Proofed</u>	<u>Submitted</u>	<u>Jacketed</u>	<u>Required</u>
/?	nelsorp1 01/26/2001	jdye 02/02/2001					S&L
/1			pgreensl 02/04/2001		gretskl 02/04/2001	lrb_docadmin 02/07/2001	

FE Sent For:

<END>

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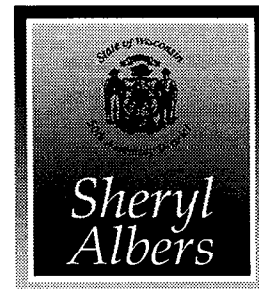
See Attached 99-4178

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To: LRB – Drafting
From: Representative Sheryl K. Albers

Date: January 22, 2001
Subject: Compulsory Counterclaims
Reference: 1999 LRB 4178/P1

Please draft a 2001 Assembly Bill relating to compulsory counterclaims, utilizing the language from 1999 LRB 4178/P1 (attached). Representatives from the State Bar of Wisconsin reviewed LRB 4178/P1, along with the drafter's notes attached, and have concluded that the draft meets their intent. Specifically, the State Bar representative noted that *Knafelc v. Dain Bosworth, Inc.*, 224 Wis.2d 346 (1999) will not have an effect on this legislation.

Thank you.

**DRAFTER'S NOTE
FROM THE
LEGISLATIVE REFERENCE BUREAU**

LRB-4178/P1dn
RPN:kmg:hmh

January 19, 2000

Please review this draft carefully to ensure that it complies with your intent. I changed some of the style to make the language more understandable.

I do not understand what the phrase at the end of s. 802.07 (1) (a) 2. b.: "and the party with the claim is not stating any counterclaim under this section" means.

It was brought to my attention by the family law drafter that *Knafelc v. Dain Bosworth, Inc.*, 224 Wis. 2d 346 (1999) may have some impact on the last paragraph of s. 802.07 (1). I suggest that you ask the State Bar representative to review that case to see if any change is necessary in this draft.

Robert P. Nelson
Senior Legislative Attorney
Phone: (608) 267-7511

PRELIMINARY DRAFT - NOT READY FOR INTRODUCTION

2001 BILL

- Regen
- 1 AN ACT to repeal and recreate 802.07 (1) of the statutes; relating to:
 - 2 permissive and compulsory counterclaims in civil actions.

Analysis by the Legislative Reference Bureau

Under current law, a defendant in a civil action may counterclaim any claim that the defendant has against the plaintiff if a judgment on that claim can be granted in the action. The counterclaim may or may not diminish or defeat the recovery sought by the plaintiff, and may claim relief exceeding the amount or different in kind from the relief sought by the plaintiff. This language has been interpreted to mean that a defendant may, but is not required to, counterclaim any claim that the defendant has against the plaintiff. In A.B.C.G. Enterprises v. Firstbank Southeast, 184 Wis. 2d 465 (1994), the Wisconsin supreme court held that the principal of res judicata precludes a defendant who may counterclaim in a prior action, but did not, from bringing a subsequent action on that claim if the new action would nullify the judgment or impair the rights established in the prior action.

This bill would adopt the counterclaim policy in effect under the federal rules of civil procedure. Under the bill, a party would be required to counterclaim any claim that the party has against the opposing party in a civil action if the claim arises out of the occurrence that is the subject of the opposing party's claim and the claim does not require the presence of a third party over whom the court cannot acquire jurisdiction. Under the bill, the party would not be required to bring the counterclaim if, at the time that the current action was commenced, the claim was the subject of another pending action or if the opposing party brought the action by a court process that did not provide the court with personal jurisdiction on that claim.

The bill also allows a party to plead a counterclaim against an opposing party that is not arising out of the occurrence that is the subject matter of the opposing party's claim.

For further information see the *state and local* fiscal estimate, which will be printed as an appendix to this bill.

The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:

1 ✓ SECTION 1. 802.07 (1)✓ of the statutes is repealed and recreated to read:

2 802.07 (1) COUNTERCLAIM.✓ (a) *Mandatory counterclaim.* 1. A pleading shall
3 state as a counterclaim any claim that the party making the claim, at the time of
4 serving the pleading, has against the opposing party if all of the following conditions
5 apply:✓

6 a. The claim arises out of the transaction or occurrence that is the subject
7 matter of the opposing party's claim.

8 b. The claim does not require the presence of 3rd parties over whom the court
9 cannot acquire jurisdiction.

10 2. A party is not required under this paragraph✓ to state as a counterclaim any
11 claim that meets any of the following conditions:

12 a. At the time that the action was commenced, the claim was the subject of
13 another pending action.

14 b. The opposing party brought suit upon a claim by attachment or other process
15 that did not provide the court with jurisdiction to render a personal jurisdiction on
16 the claim and the party with the claim is not stating any counterclaim under this
17 section.✓



State of Wisconsin

LEGISLATIVE REFERENCE BUREAU

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STEPHEN R. MILLER
CHIEF

LEGAL SECTION: (608) 266-3561
LEGAL FAX: (608) 264-6948

February 4, 2001

MEMORANDUM

To: Representative Albers

From: Robert P. Nelson, Senior Legislative Attorney

Re: LRB-2180/₁ Compulsory counterclaims

The attached draft was prepared at your request. Please review it carefully to ensure that it is accurate and satisfies your intent. If it does and you would like it jacketed for introduction, please indicate below for which house you would like the draft jacketed and return this memorandum to our office. If you have any questions about jacketing, please call our program assistants at 266-3561. Please allow one day for jacketing.

JACKET FOR ASSEMBLY JACKET FOR SENATE
7 February 2001

If you have any questions concerning the attached draft, or would like to have it redrafted, please contact me at (608) 267-7511 or at the address indicated at the top of this memorandum.

If the last paragraph of the analysis states that a fiscal estimate will be prepared, the LRB will request that it be prepared after the draft is introduced. You may obtain a fiscal estimate on the attached draft before it is introduced by calling our program assistants at 266-3561. Please note that if you have previously requested that a fiscal estimate be prepared on an earlier version of this draft, you will need to call our program assistants in order to obtain a fiscal estimate on this version before it is introduced.

Please call our program assistants at 266-3561 if you have any questions regarding this memorandum.



**STATE BAR
of WISCONSIN**

5302 Eastpark Blvd.
P.O. Box 7158
Madison, WI 53707-7158

BRIEFING PAPER: MANDATORY COUNTERCLAIMS

A counterclaim is a claim made by a defendant in opposition to or as a deduction from the claim of a plaintiff. A "mandatory counterclaim" is a claim which is required to be made by law.

Currently, Wisconsin has a permissive counterclaim statute, Wis. Stat. § 802.07(1). Section 802.07(1) is attached as Exhibit A for your reference. However, the Wisconsin Supreme Court has mandated that certain counterclaims be made despite the permissive language in Wis. Stat. § 802.07(1). A.B.C.G. Enterprises, Inc. v. Firstbank Southeast, 184 Wis. 2d 465 (1994). In the A.B.C.G. Enterprises case, the Wisconsin Supreme Court held that a claim brought in a subsequent action that "would nullify the initial judgment or impair rights established in the initial action" would be barred by the doctrine of res judicata. The doctrine of res judicata provides that a final judgment is conclusive in all subsequent actions between the same parties as to all matters which were litigated or which might have been litigated in the former proceedings. A.B.C.G. Enterprises, 184 Wis. 2d at 472-73.

The State Bar of Wisconsin believes the uncertainty in the law requires action. The current counterclaim statute (Wis. Stat. § 802.07(1)) sets a trap for the unwary; while that statute indicates that a defendant "may counterclaim," the result in the A.B.C.G. Enterprises case indicates there are, in fact, certain stances where a defendant must counterclaim.

The Federal Rules of Civil Procedure delineate both compulsory and permissive counterclaims. See F.R.C.P. 13(a) and (b), attached as Exhibit B.

There are several approaches to address this problem – such as codifying the A.B.C.G. Enterprises ruling in a statute or overturning the A.B.C.G. Enterprises holding by statute. A third option, the option chosen by the State Bar of Wisconsin, is to conform the Wisconsin counterclaim statute to the Federal Rules of Civil Procedure counterparts. The State Bar of Wisconsin decided that conforming the statute to the Federal Rules of Civil Procedure was the better course of action rather than drafting a new statute that did not have interpretive cases to use as a guide.

The proposed amended counterclaim statute appears as Exhibit C.



MANDATORY COUNTERCLAIM PROPOSAL

§ 802.07 COUNTERCLAIM AND CROSS-CLAIM.

(1) (a) MANDATORY COUNTERCLAIM. 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 over whom the court cannot acquire jurisdiction. The pleader need not state the claim if (1) at the time the action was commenced that the claim was the subject of another pending action, or (2) 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 section.

(b) PERMISSIVE COUNTERCLAIM. A pleading may state as a counterclaim any claim against an opposing party not arising out of the transaction or occurrence that is the subject matter of the opposing party's claim.

[Repeal remainder of (1) except as provided in (c)]

(c) SCOPE OF COUNTERCLAIM. A counterclaim may or may not diminish or defeat the recovery sought by the opposing party. Except as provided by s. 802.02(1m), the counterclaim may claim relief exceeding in amount or different in kind from that sought in the pleading of the opposing party.

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800.01 (2)

(d) This section does not apply to Chapter 766 and 767.

↳ Cause of action arising under

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Vol. 71, No. 12, December 1998

Bench Bar Committee Mandatory Counterclaim Proposal

Should Wisconsin Change its Counterclaim Statute?

Pro: The Bench Bar Committee proposal removes guesswork as to what claims are mandatory counterclaims and provides finality and equity by ensuring certain claims are litigated when they should be.

By Donald Leo Bach

Editor's Note: To view materials referenced in this article you must have and/or install Adobe Acrobat Reader 3.0 on your computer.

Suppose you have a client who has just been sued in circuit court. The client advises you that she has a claim against the suing party. As a good lawyer you do what you were taught in law school, go to the statute book, find the one on counterclaims - section 802.07 - and read it. The statute tells you that a defendant "*may* counterclaim any claim which the defendant has against a plaintiff." You conclude that in Wisconsin counterclaims are permissive, and you advise the client that she does not have to bring a counterclaim in this lawsuit if she does not wish to do so.

But wait. Have you read *A.B.C.G. Enterprises Inc. v. First Bank Southeast N.A.*, 184 Wis. 2d 465, 515 N.W.2d 904 (1994)? In that case, the Wisconsin Supreme Court held that the principles of res judicata (claim preclusion) preclude a defendant who could but did not counterclaim in a prior action from bringing a later action on the claim if it "would nullify the initial judgment" or "impair rights established in the initial action."

Thus, the current counterclaim statute sets a trap for the unwary; while that

statute indicates that a party *may* counterclaim, the result in *A.B.C.G.* indicates that there are, in fact, certain instances where a party *must* counterclaim.

As a result of this situation, last year the State Bar Bench Bar Committee surveyed 1,559 State Bar members - including 1,154 lawyers and 405 judges - on counterclaims (and other issues). The survey asked, in view of case law, whether Wisconsin should mandate counterclaims in chapter 802 of the Wisconsin Statutes. Of those expressing an opinion (57 percent of respondents expressed no opinion or gave no response), 68 percent agreed to some degree that Wisconsin should mandate counterclaims by statute. Judges were more likely than lawyers to agree with this opinion.

In view of this survey response and because of the potential malpractice trap present, the Bench Bar Committee and its legislative subcommittee believe that action should be taken. The legislative subcommittee considered several possible alternatives to address the situation: 1) attempt to codify the *A.B.C.G.* case; 2) overturn *A.B.C.G.* by statute; and 3) conform the Wisconsin counterclaim statute to the Federal Rules of Civil Procedure counterpart.

Federal Rules of Civil Procedure Rule 13(a) provides that 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 claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction. Federal Rules of Civil Procedure Rule 13(b) indicates that any claim against an opposing party not arising out of the transaction or occurrence that is the subject matter of the opposing claim is a permissive counterclaim.

The legislative subcommittee believes, and the Bench Bar Committee agrees, that the most desirable option is to conform Wisconsin practice to the federal requirements.

The Bench Bar Committee believes Wisconsin practice should conform to the federal requirements because the current situation is unacceptable especially for newer lawyers who may not have come across *A.B.C.G.* Further, use of the federal rule involves less "guesswork" as to what claims are or are not mandatory counterclaims and provides finality and equity by ensuring certain claims be litigated when they should be.

Though the statutes indicate the opposite, certain counterclaims *already* are mandated by way of case law. Further, the State Bar Litigation Section has overstated, in its opposition, the "specter" of having to decide whether to bring a counterclaim within 45 days. First, 45 days is not an unreasonable period to perform an investigation. Second, courts routinely set much later dates for amendments of pleadings in Scheduling Orders including the assertion of counterclaims. Third, section 802.09 of the Wisconsin Statutes allows a party to amend pleadings within six months without leave of the court.

The Bench Bar Committee's proposed rule solves the potential malpractice problem, eliminates much if not all of the guesswork under *A.B.C.G.* as to what counterclaims must be brought, and serves judicial efficiency by ensuring that the parties litigate the claims they have against each other arising out of the same transaction or occurrence.

Donald Leo Bach, U.W. 1974 cum laude, chairs the State Bar Bench Bar Committee - a committee of lawyers and judges tasked with evaluating and making recommendations for changes in Wisconsin's justice system. Bach is a shareholder in DeWitt Ross & Stevens S.C., Madison.

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