

The Effect of the Statute of Limitations on Compulsory Counterclaims: An Analysis of Present Indiana Law

I. INTRODUCTION

The Indiana General Assembly recently reaffirmed the inherent power of the Indiana Supreme Court to adopt, amend, and rescind rules of court.¹ The significance of this legislative action is two-fold. First, the legislature recognizes that it is the exclusive prerogative of the Indiana Supreme Court to establish and abolish procedural rules governing the course of litigation.² Second, any legislative enactment that infringes upon that prerogative is invalid.³ Indiana Code section 34-5-2-1 was enacted for the purpose of removing the conflict that would result from both the legislature and the supreme court promulgating rules of procedure.⁴ Further, this section was enacted "to remedy . . . abuses and imperfections [which] may be found to exist in the practice."⁵ This statute provides the Indiana Supreme Court with the unique opportunity to remedy the problem created by trial rule 13.

Trial rule 13 of the Indiana Rules of Trial Procedure requires a defendant in some cases,⁶ and permits a defendant in all

¹IND. CODE ANN. § 34-5-2-1 (West 1983).

²See *Otterman v. Industrial Bd.*, Violent Crime Compensation Div., 473 N.E.2d 1021, 1021 (Ind. Ct. App. 1985).

³*Id.*

⁴IND. CODE ANN. § 34-5-2-1 (West 1983) states:

All statutes relating to practice and procedure in any of the courts of this state shall have, and remain in, force and effect only as herein provided. The supreme court shall have the power to adopt, amend and rescind rules of court which shall govern and control practice and procedure in all the courts of this state; such rules to be promulgated and to take effect under such rules as the supreme court shall adopt, and thereafter all laws in conflict therewith shall be of no further force or effect. The purpose of this chapter is to enable the supreme court to simplify and abbreviate the pleadings and proceedings; to expedite the decision of causes; to remedy such abuses and imperfections as may be found to exist in the practice; to abolish all unnecessary forms and technicalities in pleading and practice; and to abolish fictions and unnecessary process and proceedings.

⁵*Id.*

⁶IND. R. TR. P. 13(A) states:

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:

- (1) at the time the action was commenced the claim was the subject of

others,⁷ to assert any claim that he may have against the plaintiff as a counterclaim in the same suit.⁸ The defendant may seek and recover relief exceeding the amount sought by the plaintiff.⁹ For example, if A sues B for \$100 in personal property damages sustained in an automobile collision, B may counterclaim seeking \$1,000 for personal injuries sustained in the same accident. If B wins, he may recover the full \$1,000.

Trial rule 13(J) allows a defendant to assert a time-barred claim to the extent that it defeats or diminishes the plaintiff's claim.¹⁰ If the applicable statute of limitations runs subsequent to the plaintiff filing his claim, but previous to the defendant filing his counterclaim, an issue arises as to whether the defendant's counterclaim is barred for the purposes of rule 13(J) or, on the other hand, whether the filing of the plaintiff's suit tolls the statute of limitations so that the defendant's counterclaim is not time-barred. Indiana law suggests that the defendant will be barred from asserting his claim to the extent that it exceeds the amount sought by the plaintiff.¹¹

The Indiana Rules of Trial Procedure do not expressly indicate whether the filing of the plaintiff's claim tolls the statute of limitations for the defendant's counterclaim. Trial rule 13(J), which deals specifically with counterclaims that normally would be time-barred, simply establishes

another pending action; or

(2) the opposing party brought suit upon his 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.

⁷IND. R. TR. P. 13(B) states: "[a] pleading may state as a counterclaim any claim against an opposing party not arising out of the same transaction or occurrence that is the subject-matter of the opposing party's claim."

⁸The language of the rules does not specifically speak in terms of defendants and plaintiffs, but rather of parties asserting claims against other parties. For the purposes of clarity and illustration, this Note will address the defendant-counterclaimant model, although the law applies equally to the plaintiff-counterclaimant.

⁹See IND. R. TR. P. 13(C). "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." *Id.*

¹⁰See IND. R. TR. P. 13(J)(1).

The statute of limitations, a nonclaim statute or other discharge at law shall not bar a claim asserted as a counterclaim to the extent that:

(1) it diminishes or defeats the opposing party's claim if it arises out of the transaction or occurrence that is the subject-matter of the opposing party's claim, or if it could have been asserted as a counterclaim to the opposing party's claim before it (the counter-claim) was barred.

¹¹See, e.g., *Chauffeurs, Teamsters, Warehousemen and Helpers Local Union No. 135 v. Jefferson Trucking Co.*, 473 F. Supp. 1255 (S.D. Ind. 1979); *Crivaro v. Rader*, 469 N.E.2d 1184 (Ind. Ct. App. 1984); *In re Estate of Compton v. Shelby Nat'l Bank*, 406 N.E.2d 365 (Ind. Ct. App. 1980); *Streets v. M.G.I.C. Mortgage Corp. and Assoc. Fin. Serv. Co. of Ind.*, 177 Ind. App. 184, 378 N.E.2d 915 (1978).

that such a counterclaim can offset the plaintiff's claim.¹² The rule says nothing about whether a defendant-counterclaimant may recover damages in excess of the damages sought by the plaintiff when the statute of limitations for filing an independent action by the defendant expires between the filing of the plaintiff's complaint and the filing of the counterclaim. Consequently, a defendant who has been hauled into court may be left without an adequate remedy.

The judicial responses in jurisdictions addressing this issue of the untimely counterclaim have been inconsistent; the courts have adopted various conflicting and confusing solutions.¹³ Some courts have taken the view that the commencement of the plaintiff's action tolls the statute of limitations with respect to relief or claims for damages arising out of the same transaction or occurrence.¹⁴ Others have held that the commencement of the plaintiff's action does not toll the statute of limitations where the defendant's counterclaim arises out of the same transaction or occurrence, except for those pleadings that the court considers to be purely defensive.¹⁵ One reason invoked by these courts is that allowing the defendant to assert an otherwise time-barred claim, to the extent that it diminishes or defeats the plaintiff's claim, tempers the harshness that would result from totally barring the claim because it was filed too late.¹⁶ Indiana follows this latter view.¹⁷

In addition to judicial responses, several state legislatures have enacted statutes to remedy the situation. Generally, where the matter has been governed by statute, the state legislatures have favored tolling the statute of limitations as to the defendant's counterclaim.¹⁸ However,

¹²IND. R. TR. P. 13(J). Similarly, the federal rules do not address the issue. See FED. R. CIV. P. 13. There is no federal prototype to Indiana trial rule 13(J).

¹³See, e.g., *Wallace v. Patterson*, 85 Mich. App. 266, 271 N.W.2d 194 (1978), *rev'd on other grounds*, 405 Mich. 825, 289 N.W.2d 924 (1979) (plaintiff's filing action tolls statute of limitations). *But see Duhammel v. Star*, 653 P.2d 15 (Ariz. Ct. App. 1982) (plaintiff's filing action does not toll statute of limitations).

¹⁴See *Anton v. Lehpamer*, 534 F. Supp. 239 (N.D. Ill. 1982); *Azada v. Carson*, 252 F. Supp. 988 (D. Hawaii 1966) (cited as majority rule); *Armstrong v. Logsdon*, 469 S.W.2d 342 (Ky. Ct. App. 1971); *Wallace v. Patterson*, 85 Mich. App. 266, 271 N.W.2d 194 (1978), *rev'd on other grounds*, 405 Mich. 825, 289 N.W.2d 924 (1979).

¹⁵See *Duhammel v. Star*, 653 P.2d 15 (Ariz. Ct. App. 1982); *Di Norscia v. Tibbett*, 50 Del. 118, 124 A.2d 715 (1956); *Lovejoy v. Ahearn*, 223 Tenn. 562, 448 S.W.2d 420 (1969).

¹⁶*Crivaro v. Rader*, 469 N.E.2d 1184, 1187 (Ind. Ct. App. 1984).

¹⁷See, e.g., *Chauffeurs, Teamsters, Warehousemen and Helpers Local Union No. 135 v. Jefferson Trucking Co.*, 473 F. Supp. 1255 (S.D. Ind. 1979); *Crivaro v. Rader*, 469 N.E.2d 1184 (Ind. Ct. App. 1984); *In re Estate of Compton v. Shelby Nat'l Bank*, 406 N.E.2d 365 (Ind. Ct. App. 1980); *Streets v. M.G.I.C. Mortgage Corp. and Assoc. Fin. Serv. Co. of Ind.*, 177 Ind. App. 184, 378 N.E.2d 915 (1978).

¹⁸See, e.g., ILL. ANN. STAT. ch. 83 § 18 (Smith-Hurd 1966); N.Y. CIV. PRAC. LAW § 203(c) (McKinney 1972).

some states have enacted statutes definitively stating that untimely counterclaims seeking relief in excess of that sought by the plaintiff are barred if filed after the limitations period expires.¹⁹

Indiana does not have a statute that deals specifically with the effect of a statute of limitations on a compulsory counterclaim filed after the appropriate time period. Thus, Indiana courts have relied upon common law to address the issue of the effect of the statute of limitations on compulsory counterclaims.

Recently, the Indiana Court of Appeals was confronted with an untimely compulsory counterclaim in *Crivaro v. Rader*.²⁰ The court held that the plaintiff's commencement of the action did not toll the statute of limitations as to the defendant's counterclaim.²¹ The defendant's counterclaim, which requested relief in excess of that sought by the plaintiff, was barred by the statute of limitations.²² The court noted that its strict concern for the statute of limitations and recognition of the legislative prerogative in enacting statutes of limitation "overrode any justification . . . for extending the life of the counterclaim."²³ Pursuant to trial rule 13(J)(1), the court allowed the defendant to assert the time-barred claim to the extent that it diminished or defeated the opposing party's claim.²⁴

The rationale used by the *Crivaro* court, mainly, strict adherence to limitation statutes so as not to defeat the purpose of the statutes, is analogous to the approach used by many jurisdictions that bar the defendant's untimely counterclaim.²⁵ However, such reasoning is less persuasive when analyzed from the perspective of the purposes served by limitation statutes as espoused by the courts.²⁶ The common law approach used by this and many other jurisdictions may lead to results that, in fact, defeat the purposes for which limitation statutes and rules of trial procedure were enacted.²⁷

¹⁹See, e.g., KAN. CIV. PRAC. CODE § 60-213(d) (Vernon 1963).

²⁰469 N.E.2d 1184 (Ind. Ct. App. 1984).

²¹*Id.* at 1187.

²²*Id.* at 1186-87.

²³*Id.*

²⁴*Id.* at 1187. Because Rader sought \$1000 in damages (amount of deductible under his insurance policy), Crivaro was limited to this amount in his claim. Crivaro was not allowed to recover the \$60,000 he sought in personal injuries.

²⁵See, e.g., *Di Norscia v. Tibbett*, 50 Del. 118, 124 A.2d 715 (1956); *Brown v. Hipshire*, 553 S.W.2d 570 (Tenn. 1977).

²⁶The main purposes of a statute of limitations are to ensure that parties are given formal and reasonable notice that a claim is being asserted against them and to prevent the assertion of stale or fraudulent claims. See *State ex. rel. Young v. Noble Circuit Court*, 253 Ind. 353, 332 N.E.2d 99 (1975); *In re M.D.H.*, 437 N.E.2d 119 (Ind. Ct. App. 1982).

²⁷Rules of civil procedure, including appellate rules, were adopted in order to simplify

This Note will examine Indiana's position regarding the issue of whether the commencement of the plaintiff's action tolls the statute of limitations with respect to the defendant's compulsory counterclaim. First, this Note will survey the different judicial and legislative approaches of other jurisdictions. Second, Indiana's present position, as stated in the recent *Crivaro* decision, will be explained. Third, this Note will analyze Indiana's approach to the problem. This analysis will focus upon the common law background of compulsory counterclaims, the language and policy of trial rules, and the policy of statutes of limitation. The analysis suggests that trial rule 13(J), in its present form, is not dispositive of the issue of the untimely compulsory counterclaim; that common law and the language and policy of the Rules of Trial Procedure suggest that a compulsory counterclaim seeking affirmative relief should not be barred; and that the purposes of statutes of limitation are not defeated by allowing the time-barred claim. Finally, this Note recommends that Indiana law be changed to allow time-barred compulsory counterclaims, regardless of the type of relief sought, and proffers a solution to this effect.

II. SURVEY OF APPROACHES TAKEN BY OTHER JURISDICTIONS

A. Statute of Limitations Tolled for Defendant's Counterclaim

The courts are divided on the issue of whether the filing of a claim by a plaintiff tolls the statute of limitations as to a defendant's compulsory counterclaim.²⁸ The general rule holding that the commencement of an action by the plaintiff tolls the statute of limitations as to the defendant's then unbarred cause of action was stated in *Trinidad v. Superior Court*.²⁹ *Trinidad* involved an automobile collision and was a personal injury action brought by the driver of one automobile against the driver of the other within the applicable one year statute of limitations period.³⁰ The defendant, upon leave of court following a contested motion, brought a claim alleging personal injuries caused by the negligence of the plaintiff.³¹ This counterclaim, which the defendant entitled a "cross-complaint," was filed more than two years after the cause of action arose and, therefore, outside the one-year statute of limitations period.³² The appellate court stated that it had "consistently been held

and streamline prevailing procedural practice and to secure just, speedy, and inexpensive determination of every action. See *Southern Ind. Rural Elec. Coop. v. City of Tell City*, 179 Ind. App. 217, 384 N.E.2d 1145 (1979).

²⁸See *supra* note 13.

²⁹29 Cal. App. 3d 857, 106 Cal. Rptr. 48 (1973).

³⁰*Id.*

³¹*Id.* at 858, 106 Cal. Rptr. at 49.

³²*Id.* The statute of limitations on an action for injury caused by the neglect of another was one year.

that the commencement of an action tolls the statute of limitations as to a defendant's then unbarred cause of action against the plaintiff, 'relating to or depending upon the contract, transaction, matter, happening or accident upon which the action is brought, . . .'³³ The court reasoned that the statute of limitations as to the defendant's counterclaim was tolled by the filing of the plaintiff's original complaint, permitting the defendant to assert any claim or defense which may be available, regardless of the fact that the defendant's claim would have been barred at the time of filing by the defendant if not for the tolling of the statute by the plaintiff.³⁴ Thus, if the plaintiff filed an action one day before the applicable statute of limitations had run on the defendant's counterclaim, the defendant, who in all likelihood would not be able to interpose a counterclaim before the end of the applicable limitations period, would be permitted to assert his claim for any type of relief within the time for serving a responsive pleading.³⁵ This position has been cited as the majority rule.³⁶

However, if the defendant's claim is already barred when the plaintiff brings the suit, this tolling theory would be inapplicable. Such a situation would arise when the period for the plaintiff to assert his claim is longer than that provided for the defendant.³⁷ When the plaintiff commences his action, the defendant's counterclaim is already barred. Hence, there is no limitations period to be tolled.³⁸

Some courts have reasoned that, by commencing an action, the plaintiff has waived any defense of limitations.³⁹ According to this argument, by bringing the action, the plaintiff demonstrates that he does not desire to let rest the incident upon which the suit is founded. Thus, the defendant must be afforded the opportunity to assert or defend any claim that he may have.⁴⁰ The fact that the statute of limitations ran on the defendant's counterclaim before the plaintiff commenced his suit is immaterial, and the defendant is permitted to interpose his claim and survive a limitations defense.⁴¹

³³*Id.* at 860-61, 106 Cal. Rptr. at 49-50 (citation omitted).

³⁴*Id.*; see also *Holtzendorff v. Housing Auth. of Los Angeles*, 250 Cal. App. 2d 596, 58 Cal. Rptr. 886 (1967), *cert. denied*, 389 U.S. 1038 (1968); *Whittier v. Visscher*, 189 Cal. 450, 209 P. 23 (1922) (defendant's right of action alive when plaintiff commences suit; thus statute does not run against it).

³⁵C. WRIGHT & A. MILLER, *FEDERAL PRACTICE AND PROCEDURE*, § 1419, at 108 (1971) [hereinafter cited as C. Wright & A. Miller].

³⁶See generally Annot., 72 A.L.R. 3d 1065 (1976); 51 Am. Jur. 2d *Limitation of Actions* § 203 (1970); 54 C.J.S. *Limitations of Actions* § 285 (1948).

³⁷Sobieski, *Counterclaims and Statutes of Limitation: A Critical Commentary on Present Tennessee Law*, 42 TENN. L. REV. 291, 302 (1975).

³⁸*Id.* at 303.

³⁹See *Armstrong v. Logsdon*, 469 S.W.2d 342 (Ky. Ct. App. 1971).

⁴⁰*Id.* at 343.

⁴¹C. WRIGHT & A. MILLER, *supra* note 35.

B. Statute of Limitations Not Tolled for Defendant's Counterclaim

Several jurisdictions hold that a defendant's counterclaim is barred if filed after the expiration of the statute of limitation applicable to the plaintiff's cause of action unless the counterclaim is defensive in nature.⁴² That is, the counterclaim may not seek recovery in excess of that sought by the plaintiff. Under this approach, the plaintiff's claim does not toll the statute of limitations for the defendant's counterclaim. If the counterclaim seeks recovery beyond that sought by the plaintiff, as distinguished from defensive remedies such as set-off and recoupment,⁴³ the defendant is essentially instituting an independent cause of action that is subject to the statute of limitations.⁴⁴ The courts have noted that the defendant could, and perhaps should, have brought a separate suit prior to the running of the statute of limitations.⁴⁵

Although aware that a majority of courts allow defendants to bring compulsory counterclaims, the Delaware Supreme Court, in *Di Norscia v. Tibbett*,⁴⁶ distinguished that rule as involving cases where the counterclaim was used purely in a defensive stance, in the nature of a set-off or recoupment, and where no affirmative relief was sought. If the defendant's claim could be regarded as an independent action such that the defendant is seeking affirmative relief, the statute of limitations will apply to it as if it were a separate suit, and the untimely claim will be barred.⁴⁷ On the other hand, claims seeking set-off or recoupment or that are defensive in nature may still be asserted after the running of the statute of limitations.⁴⁸

C. The Statutory Response

In a few states, statutory provisions allow the defendant-counterclaimant to assert a time-barred claim regardless of whether that claim

⁴²See *supra* note 15.

⁴³The defense of recoupment, which arises out of the same feature of the transaction upon which the plaintiff's claim is grounded, is never barred by the statute of limitations so long as the main action is timely. See generally 51 Am. Jur. 2d *Limitation of Actions* § 203 (1970).

⁴⁴See *Solomon v. Rosol*, 10 Conn. Supp. 4 (1941).

⁴⁵See *Horace Mann Ins. Co. v. DeMirza*, 312 So.2d 501 (Fla. Dist. Ct. App. 1975).

⁴⁶50 Del. 118, 124 A.2d 715 (1956).

⁴⁷*Id.* at 119, 124 A.2d at 717.

⁴⁸See, e.g., *Unified School Dist. No. 490 v. Celotex Corp.*, 6 Kan. App. 2d 346, 629 P.2d 196 (1981); *Lovejoy v. Ahearn*, 223 Tenn. 562, 448 S.W.2d 420 (1969). However, even if a defendant's counterclaim is considered to be affirmative in nature, and therefore barred under this rule, some courts may permit the defendant to amend his answer to plead the defense of recoupment. See *Horace Mann Ins. Co. v. DeMirza*, 312 So. 2d 501 (Fla. Dist. Ct. App. 1975).

seeks what may be characterized as affirmative or defensive relief.⁴⁹ The filing of the plaintiff's claim tolls the statute of limitations as to the defendant's counterclaim for all purposes. The Illinois statute has been interpreted to allow the defendant to assert a claim if the claim was not barred at the time the plaintiff filed his original complaint.⁵⁰ The statute applies to all types of personal actions that the defendant may have against the plaintiff.⁵¹ In addition to applying to compulsory counterclaims, the statute also extends to permissive counterclaims.⁵² Even if the claim that tolled the statute of limitations is later dismissed, the defendant may have all other claims litigated in the action.⁵³ Thus, once the plaintiff files his complaint, the statute of limitations is effectively tolled as to any compulsory or permissive counterclaim that the defendant may assert against the plaintiff, even if one of these claims is later dismissed.

Similarly, New York has a provision in its code that allows the defendant to assert an untimely claim.⁵⁴ However, new claims asserted in amended pleadings have been held to be barred if based on grounds distinct from those asserted in prior pleadings.⁵⁵ The statute extends to cross-complaints and counterclaims seeking affirmative relief.⁵⁶ Accordingly, the courts have suggested that, in cases in which the claim asserted by the defendant relates to the same transaction that gave rise to the plaintiff's complaint, the defendant's claim should be allowed as a defense, counterclaim or cross-claim.⁵⁷

⁴⁹See, e.g., ILL. ANN. STAT. Ch. 83 § 18 (Smith-Hurd 1966), which provides: "[a] defendant may plead a set-off or counter claim barred by the statute of limitation, while held and owned by him, to any action, the cause of which was owned by the plaintiff or person under whom he claims, before such set-off or counter claim was so barred, and not otherwise" See also N.Y. CIV. PRAC. LAW § 203(c) (McKinney 1972) ("a defense or counterclaim is not barred if it was not barred at the time the claims asserted in the complaint were interposed").

⁵⁰See, e.g., *Benckendorf v. Burlington N. R.R.*, 112 Ill. App. 3d 658, 445 N.E.2d 837 (1983); *Carnahan v. McKinley*, 80 Ill. App. 2d 318, 224 N.E.2d 297 (1967).

⁵¹See ILL. ANN. STAT. Ch. 83 § 18 (Smith-Hurd 1966).

⁵²See *Benckendorf v. Burlington N. R.R.*, 112 Ill. App. 3d 568, 445 N.E.2d 837 (1983).

⁵³See *Ogg v. City of Springfield*, 121 Ill. App. 3d 25, 458 N.E.2d 1331 (1984).

⁵⁴N.Y. CIV. PRAC. LAW § 203(c) (McKinney 1972).

⁵⁵*Seligson v. Chase Manhattan Bank, Nat'l Ass'n*, 50 A.D.2d 206, 376 N.Y.S.2d 899 (1975); *Nichimen & Co. v. Framen Steel Supply Co.*, 44 Misc. 2d 260, 253 N.Y.S.2d 713 (N.Y. Sup. Ct. 1964).

⁵⁶See *Seligson v. Chase Manhattan Bank, Nat'l Ass'n*, 50 A.D.2d 206, 376 N.Y.S.2d 899 (1975). Although N.Y. CIV. PRAC. LAW § 203(c) speaks only to defense and counterclaims, the court held that "despite the apparent legislative oversight, we see no reason why CPLR § 203(c) should not apply to cross-claims; particularly since '[a] cause of action in a counterclaim or cross-claim shall be treated' as far as practicable, as if it were contained in a complaint" *Id.*; 376 N.Y.S.2d at 904.

⁵⁷See *Nichimen & Co. v. Framen Steel Supply Co.*, 44 Misc. 2d 260, 253 N.Y.S.2d 713 (N.Y. Sup. Ct. 1964).

The purpose of these statutes has been to avoid potential injustice that would result if the court barred a defendant's counterclaim or cross-complaint that arose from the same accident or incident that gave rise to the plaintiff's suit.⁵⁸ Courts have reasoned that if the plaintiff is permitted to present a claim, the defendant should not be prevented from doing the same simply because of a "mere technicality."⁵⁹ Simple justice would seem to dictate that the defendant should be given the opportunity to present a claim for relief based upon the same accident or incident.⁶⁰

A Kansas statute was interpreted to bar a defendant from asserting a counterclaim or cross-claim after the applicable statute of limitations expired, unless the defendant's claim was defensive in nature.⁶¹ Currently, the statute provides:

When cross demands have existed between persons under such circumstances that, if one had brought an action against the other, a counterclaim or cross-claim could have been set up, neither can be deprived of the benefit . . . of the statute of limitations . . . but the two demands must be deemed compensated so far as they equal each other.⁶²

In accord with this statute, Kansas courts have refused to allow the defendant to seek any type of affirmative relief.⁶³ Although the defendant is barred from seeking affirmative relief, he still has the right to use a counterclaim for purely defensive purposes.⁶⁴

E. Summary

Courts outside Indiana are divided on the issue of the untimely counterclaim that arises out of the same accident or incident as the plaintiff's complaint.⁶⁵ The prevailing view suggests that, unless otherwise provided by statute, if a counterclaim, set-off, or cross-complaint is not barred by the statute of limitations when the action is commenced, it will not be barred while the action is pending.⁶⁶ The plaintiff's filing a

⁵⁸See *County of Westchester v. Edo Corp.*, 83 A.D.2d 829, 830, 441 N.Y.S.2d 553, 555 (1981).

⁵⁹See *Azada v. Carson*, 252 F. Supp. 988, 989 (D. Hawaii 1966).

⁶⁰*Id.*

⁶¹See *Crumrine v. Cummings*, 172 Kan. 290, 240 P.2d 463 (1952).

⁶²KAN. CIV. PROC. CODE ANN. § 60-213(d) (Vernon 1963).

⁶³See *Lightcap v. Mobil Oil Corp.*, 221 Kan. 448, 562 P.2d 1 (1976), *cert. denied*, 434 U.S. 876 (1977).

⁶⁴See *Christenson v. Akin*, 183 Kan. 207, 326 P.2d 313 (1958); *Unified School Dist. No. 490 v. Celotex Corp.*, 6 Kan. App. 2d 346, 629 P.2d 196 (1981).

⁶⁵See *supra* note 13 and accompanying text.

⁶⁶See *supra* note 14 and accompanying text.

complaint tolls the statute of limitations as to the defendant's counterclaim. There is also authority to suggest that a pleading in the nature of a set-off, conterclaim, or cross-complaint that is regarded as an affirmative, as opposed to a defensive, claim is subject to the operation of the statute of limitations.⁶⁷ The defendant is not given the benefit of the tolling rule because he had the opportunity to institute an independent action against the plaintiff during the applicable statutory period.

III. PRESENT POSITION IN INDIANA

The courts clearly have not resolved the question of whether the plaintiff, by instituting his action, tolls the statute of limitations with regard to compulsory counterclaims seeking affirmative relief asserted after the applicable statute of limitations has expired. Recent decisions suggest that Indiana is among those jurisdictions that bar the untimely compulsory counterclaim, unless it seeks to defeat or diminish the opposing party's claim or is purely defensive in nature.⁶⁸ A counterclaim asserted after the expiration of the statute of limitations is not permitted if the counterclaim is for affirmative relief.⁶⁹

*Crivaro v. Rader*⁷⁰ is the most recent Indiana decision that addresses this issue. In *Crivaro*, two semi-tractor trailers collided. The plaintiff filed a complaint nineteen days before the expiration of the two-year statute of limitations, alleging negligence on the part of the defendant, Crivaro.⁷¹ Rader sought \$1,000 in damages.⁷² Crivaro responded by filing a counterclaim in which he sought to recover \$60,000 for personal injuries and property damage sustained in the collision.⁷³ The counterclaim was filed eight days after the running of the statute of limitations on the action.⁷⁴ Rader filed an answer to Crivaro's counterclaim, pleading as an affirmative defense that the statute of limitations had run on the counterclaim, and sought partial summary judgment to limit Crivaro's claim to

⁶⁷See *supra* note 15 and accompanying text.

⁶⁸See *Chauffeurs, Teamsters, Warehousemen and Helpers Local Union No. 135 v. Jefferson Trucking Co.*, 473 F. Supp. 1255 (S.D. Ind. 1979); *Crivaro v. Rader*, 469 N.E.2d 1184 (Ind. Ct. App. 1984); *Streets v. M.G.I.C. Mortgage Corp. and Assoc. Fin. Serv. Co. of Ind.*, 177 Ind. App. 184, 378 N.E.2d 915 (1978).

⁶⁹See *Chauffeurs, Teamsters, Warehousemen and Helpers Local Union No. 135 v. Jefferson Trucking Co.*, 473 F. Supp. 1255, 1258 (S.D. Ind. 1979).

⁷⁰469 N.E.2d 1184 (Ind. Ct. App. 1984).

⁷¹*Id.* at 1185.

⁷²*Id.* This represented the amount of Rader's deductible under his insurance policy with plaintiff Harco National Insurance Company covering his 1974 International Harvester tractor, which was damaged in the collision.

⁷³*Id.*

⁷⁴*Id.* According to the court, Crivaro had eleven days after receiving notice of Rader's claim in which to file within the limitations period. *Id.* at 1187 n.7.

the amount of \$1,000.⁷⁵ The trial court granted Rader's motion on the basis that Crivaro's claim was barred by the applicable statute of limitations except to the extent that it diminished or defeated Rader's claim asserted in the original complaint.⁷⁶

The appellate court affirmed the lower court's holding.⁷⁷ The court reasoned that its concern for strict adherence to limitation statutes and recognition of legislative prerogative in this area "overrode any justification . . . for extending the life of the [untimely] counterclaim."⁷⁸ Prior to determining that Crivaro's counterclaim was barred, the court dispensed with the plaintiff's and defendant's arguments in support of their positions. The court found that neither the cases cited by the defendant nor the plaintiff's construction of rule 13(J)(1) were dispositive of the issue.⁷⁹ The defendant noted that the issue before the court was not addressed or resolved by Indiana trial rule 13(J).⁸⁰ The defendant argued that prior Indiana cases, specifically *Eve v. Louis*⁸¹ and *Zink v. Zink*,⁸² allowed a claim seeking affirmative relief to be asserted and litigated in the same suit even if the time for filing an independent action had expired.⁸³ However, the *Crivaro* court distinguished the earlier Indiana cases cited by the defendant in much the same manner as the *Di Norscia* court distinguished the majority rule regarding the tolling of statutes of limitation for counterclaims.⁸⁴ The *Crivaro* court stated that the Indiana cases that allowed the defendant to assert the untimely counterclaim were distinguishable on the basis that the counterclaims sought relief that was defensive in nature.⁸⁵

The *Crivaro* court was quick to accept the defendant's argument that trial rule 13(J) does not address the issue of whether a claim that is not barred at the time the plaintiff files the action and that seeks affirmative relief is barred by the statute of limitations.⁸⁶ Nonetheless,

⁷⁵*Id.* at 1185. See also IND. R. TR. P. 56(C). The rule includes the following language: "[a] summary judgment may be rendered upon less than all the issues or claims, including without limitation the issue of liability or damages alone although there is a genuine issue as to damages or liability as the case may be." *Id.*

⁷⁶469 N.E.2d at 1185.

⁷⁷*Id.* at 1187. Judge Shields wrote the opinion for the court. Chief Judge Buchanan and Judge Sullivan concurred.

⁷⁸*Id.*

⁷⁹*Id.* at 1185.

⁸⁰Brief for Appellant at 5-6, *Crivaro*, 469 N.E.2d 1184.

⁸¹91 Ind. 457 (1883).

⁸²56 Ind. App. 677, 106 N.E. 881 (1914).

⁸³See *Eve*, 91 Ind. 457; *Zink*, 56 Ind. App. 677, 106 N.E. 381.

⁸⁴See *supra* note 46 and accompanying text.

⁸⁵469 N.E.2d at 1185.

⁸⁶See *supra* note 80.

the court rejected further arguments of the defendant and affirmed the trial court's refusal to permit affirmative recovery by way of a time-barred counterclaim.⁸⁷ The *Crivaro* court ultimately based its finding on the proposition that the purposes of the statute of limitations would best be served by barring the untimely counterclaim.⁸⁸ Because statutes of limitation are legislative creations, the courts would be engaging in judicial legislation by construing limitation statutes in such a manner that would allow the defendant to assert the time-barred compulsory counterclaim.⁸⁹

The *Crivaro* court noted that Indiana courts have emphasized that statutes of limitations are statutes of repose, "founded upon a rule of necessity and convenience and the well-being of society."⁹⁰ In *Bennett v. Bennett*,⁹¹ cited by the *Crivaro* court, it was noted that limitation statutes "are grounded upon the presumption that one having a well-founded claim will not delay enforcing it."⁹² The court reminded the defendant that "the aim of limitation statutes [is] to encourage those with meritorious claims to enforce them without delay."⁹³ Concluding that *Crivaro's* counterclaim was barred by the statute of limitations, the court applied trial rule 13(J)(1) and allowed the defendant to assert the time-barred claim to the extent that it diminished or defeated the plaintiff's claim.⁹⁴

IV. ANALYSIS OF THE INDIANA APPROACH

A. Common Law and Trial Rule 13(J)

The *Crivaro* court stated that neither the cases cited by the defendant nor the construction of trial rule 13(J) supported by the plaintiff was dispositive of the issue of the untimely counterclaim.⁹⁵ However, Indiana common law may suggest that trial rule 13(J) should be interpreted to allow time-barred claims regardless of the type of relief sought by the defendant.

As a general rule, under early common law recoupment and set-off procedures, a defendant could gain relief within the confines of the action only by diminishing or defeating the plaintiff's claim.⁹⁶ A defendant

⁸⁷469 N.E.2d at 1187.

⁸⁸*Id.* at 1186-87.

⁸⁹*Id.*

⁹⁰*Id.* (citing *Indiana Dep't of State Revenue v. Estate of Puett*, 435 N.E.2d 298 (Ind. Ct. App. 1982)).

⁹¹172 Ind. App. 581, 361 N.E.2d 193 (1977).

⁹²*Id.* at 585, 361 N.E.2d at 196.

⁹³469 N.E.2d at 1187.

⁹⁴*Id.*

⁹⁵*Id.* at 1185.

⁹⁶C. WRIGHT & A. MILLER, *supra* note 35, § 1425, at 137 (1971).

could not seek affirmative relief.⁹⁷ In *Crivaro*, the court distinguished the *Eve*⁹⁸ and *Zink*⁹⁹ cases on the basis that the relief sought by the defendants in those cases was defensive; therefore, the claims were not barred.¹⁰⁰ Indiana common law was such that a defendant could recover on a counterclaim only that which recoupment and setoff procedures allowed.¹⁰¹

However, the notion that counterclaim relief must be limited to that which defeats or diminishes the opponent's relief apparently never had full currency in Indiana equity practice.¹⁰² Indiana allowed setoff in certain cases independent of specific statutory authority.¹⁰³ Equitable setoffs were not all mutual,¹⁰⁴ but were granted by courts in equity to prevent irremediable injustice.¹⁰⁵ From the early courts' interpretation and application of setoffs, it was clear that the relief sought in counterclaims could exceed the amount or be different in kind from the relief asked for by the plaintiff; a defendant could seek recovery in excess of that sought by the plaintiff.¹⁰⁶ Further, setoff in the form of affirmative relief was codified in the early 1900's¹⁰⁷ and later adopted in the Indiana Rules of Trial Procedure.¹⁰⁸ Trial rule 13(C) continues the liberal practice laid down by the Indiana courts and makes it clear that there is no procedural limitation on the type of claim which may be interposed in a counterclaim.¹⁰⁹

Trial rule 13(J) makes an exception for the filing of common law recoupment and setoff after the statutory period has expired.¹¹⁰ The counterclaim must be compulsory in nature.¹¹¹ The drafters used the

⁹⁷*Id.*

⁹⁸91 Ind. 457 (1883).

⁹⁹56 Ind. App. 677, 106 N.E. 881 (1914).

¹⁰⁰469 N.E.2d at 1185.

¹⁰¹See *supra* note 48; see also *Teeters v. City Nat'l Bank of Auburn*, 214 Ind. 498, 14 N.E.2d 1004 (1938). "Legal setoff is wholly statutory in Indiana and is a counteraction growing out of an independent transaction pleaded by the defendant to counterbalance the plaintiff's recovery and to recover judgment in his own favor." *Id.* at 501, 14 N.E.2d at 1005.

¹⁰²See *Eigenman v. Clark*, 21 Ind. App. 129, 51 N.E. 725 (1898).

¹⁰³See *Wolcott v. Pierre*, 100 Ind. App. 16, 188 N.E. 596 (1934).

¹⁰⁴*Id.*

¹⁰⁵*Keightley v. Walls*, 24 Ind. 205 (1865); *McKinney v. Pure Oil Co.*, 129 Ind. App. 223, 154 N.E.2d 53 (1958); *Anderson v. Biggs*, 118 Ind. App. 266, 77 N.E.2d 909 (1948).

¹⁰⁶See *Love v. Oldham*, 22 Ind. 51 (1864); *Gordon v. George*, 12 Ind. 408 (1859); *Reardon v. Higgins*, 39 Ind. App. 363, 79 N.E. 108 (1906).

¹⁰⁷See IND. CODE ANN. § 2-2508 (Burns 1948).

¹⁰⁸See IND. R. TR. P. 13(C).

¹⁰⁹IND. R. TR. P. 13(C) comment (Discussion Draft 1968).

¹¹⁰See *Albert Johann & Sons Co., v. Echols*, 143 Ind. App. 122, 238 N.E.2d 685 (1968); see IND. R. TR. P. 13(J).

¹¹¹See IND. R. TR. P. 13(J)(1).

same defensive terms, such as "diminish" and "defeat," that were used by the courts.¹¹² The question therefore arises as to whether trial rule 13(J) was drafted with the intent of making an exception for the entire range of recovery available at common law under the compulsory counterclaim, including the common law remedies of recoupment and setoff. As noted, a defendant could seek affirmative or defensive relief under common law setoff.¹¹³ Although trial rule 13(J), in its present form, uses defensive terms, it arguably was intended to allow affirmative recovery. The issue, in light of common law, may not be whether the compulsory counterclaim seeking affirmative relief is time-barred, but whether trial rule 13(J) is intended to allow compulsory counterclaims to be filed after the applicable statute of limitations for any purpose. The use of defensive terms by the drafters of the trial rules is unfortunate and has led to much confusion as to the actual purpose of this rule. Common law and the exception supposedly created by trial rule 13(J) suggest that compulsory counterclaims seeking relief in excess of that sought by the plaintiff were not intended to be time-barred, but to be included in the exception.¹¹⁴ In its present form, however, trial rule 13(J) does not come into play until the defendant's claim is deemed time-barred.

B. *Affirmative Versus Defensive Relief*

Under the present trial rule 13(J), an additional problem arises as to the difficulty that courts may have in distinguishing clearly between counterclaims seeking affirmative relief and those primarily for defensive purposes.¹¹⁵ This distinction has been used by many courts, including those in Indiana, to allow or to bar an untimely counterclaim.¹¹⁶ According to this approach, if the defendant asserts the counterclaim after the applicable statute of limitations has expired and he is seeking damages in excess of the amount sought by the plaintiff, the counterclaim is affirmative and therefore barred by the statute of limitations.¹¹⁷ Such a distinction becomes increasingly confusing when the defendant is not seeking monetary damages, but instead is seeking equitable relief, such as specific performance of a contract or injunctive or declaratory relief.

¹¹²*Id.*

¹¹³*See* Love v. Oldham, 22 Ind. 51 (1864); Gordon v. George, 12 Ind. 408 (1859); Reardon v. Higgins, 39 Ind. App. 363, 79 N.E. 208 (1906).

¹¹⁴*See supra* notes 110-112 and accompanying text.

¹¹⁵*See, e.g.,* Chauffeurs, Teamsters, Warehousemen and Helpers Local Union No. 135 v. Jefferson Trucking Co., 473 F. Supp. 1255 (S.D. Ind. 1979); Di Norscia v. Tibbett, 50 Del. 118, 124 A.2d 715 (1956).

¹¹⁶*See supra* note 17.

¹¹⁷*See supra* note 15 and accompanying text.

A counterclaim asserted by way of a set-off or recoupment or that seeks to diminish or defeat the plaintiff's claim is defensive in nature.¹¹⁸ At present, Indiana will permit the adjudication of untimely counterclaims premised upon only defensive theories.¹¹⁹ This distinction as to the type of relief sought by the defendant is confusing and inappropriate. There is no explicit or implied provision in the Indiana Rules of Trial Procedure that even suggests that compulsory counterclaims should be distinguished in such a manner.¹²⁰

C. Language and Policy of Trial Rules Suggests Defendant's Compulsory Counterclaim Not Intended to be Barred

The language and policy of the Indiana trial rules suggests that compulsory counterclaims were not intended to be subject to the running of the statute of limitations. Rule 13 requires that a defendant interpose a counterclaim if it arises out of the "same transaction or occurrence" that gave rise to the plaintiff's claim.¹²¹ The term "transaction or occurrence" was intended to be interpreted broadly so as to avoid multiple law suits.¹²² The language expressly provides that "any" claims arising from the "same transaction or occurrence" should be brought in the same suit.¹²³ The rule does not prohibit untimely compulsory counterclaims. Implicit in this rule is the notion that judicial economy would best be served by litigating all claims, even those filed after the applicable statute of limitations for the plaintiff's claim had expired.¹²⁴ As long as the defendant's counterclaim arises out of the same transaction or occurrence, there is little reason why it should not be adjudicated with other related claims in a single proceeding.

Yet, according to the holding in *Crivaro*, if a plaintiff files a negligence action one day before the running of the statute of limitations, the defendant, who would probably be unable to answer and file a counterclaim before the statutory period expires, would be barred from asserting that counterclaim if he sought relief greater than that sought by the plaintiff. It would be irrelevant that the defendant's claim arose from the same accident as the plaintiff's claim, except to the extent that

¹¹⁸See *supra* notes 94-95 and accompanying text.

¹¹⁹See *supra* note 17.

¹²⁰See IND. R. TR. P. 13. Nor is there such a provision in the Federal Rules of Civil Procedure. See FED. R. CIV. P. 13.

¹²¹IND. R. TR. P. 13(A).

¹²²See *Daube and Cord v. LaPorte County Farm Bureau Co-op. Ass'n*, 454 N.E.2d 891, 893 (Ind. Ct. App. 1983); see also IND. R. TR. P. 13(A) comment (Discussion Draft 1968).

¹²³IND. R. TR. P. 13(A).

¹²⁴*Cf. Bristol Farmers Mkt. and Auction Co. v. Arlen Realty & Dev. Corp.*, 589 F.2d 1214 (3d Cir. 1978).

the court would allow the defendant to assert a claim which diminishes or defeats the plaintiff's claim.¹²⁵ Thus, if the plaintiff is found fully liable, the defendant will not be allowed to recover anything. The Indiana position seemingly ignores the merit of the defendant's claim and punishes the defendant for not bringing an independent action. Surely the legislature did not intend such an unjust result when it adopted the Rules of Trial Procedure.

In addressing the issue of the untimely counterclaim, the *Crivaro* court directs its analysis toward the relief sought by the defendant.¹²⁶ This analysis is misdirected in that the court is adhering to the defensive labels developed at common law as a means for barring untimely counterclaims. Regardless of the defendant's actual losses from the accident or incident that gave rise to the plaintiff's claim, the defendant is limited to seeking only that relief which defeats or diminishes the plaintiff's claim, if he wants his fair day in court.¹²⁷

Earlier Indiana cases and the trial rules themselves suggest that the court's analysis should be directed toward the transaction or occurrence that gave rise to the plaintiff's claim.¹²⁸ If the defendant's counterclaim arose from the same transaction or occurrence as the plaintiff's cause of action, the defendant's counterclaim is compulsory in nature, and he should be allowed to have that claim litigated regardless of the relief sought or the expiration of the limitation period. No further inquiry should be made by the court.

Nowhere do the rules distinguish as to the type of relief sought by the defendant-counterclaimant as a means for barring the untimely compulsory counterclaim.¹²⁹ Similarly, there is nothing to suggest that compulsory counterclaims were intended to be barred by statutes of limitation. Indiana trial rule 13(A) was specifically enacted to avoid multiple law suits arising from the same accident or incident,¹³⁰ yet a court would suggest a defendant with a meritorious claim should have filed that claim before the plaintiff filed his claim.

Allowing a time-barred counterclaim is entirely consistent with the purposes and policies with which the rules were enacted by the state legislature.¹³¹ The rules of trial and appellate procedure were adopted

¹²⁵See IND. R. TR. P. 13(J).

¹²⁶469 N.E.2d at 1185.

¹²⁷See IND. R. TR. P. 13(J).

¹²⁸See *Eve v. Louis*, 91 Ind. 457 (1883); *Zink v. Zink*, 56 Ind. App. 677, 106 N.E. 381 (1914).

¹²⁹See generally IND. R. TR. P. 13.

¹³⁰See *Daube and Cord v. LaPorte County Farm Bureau Co-op. Ass'n*, 454 N.E.2d 891, 893 (Ind. Ct. App. 1983).

¹³¹See *supra* note 27.

in order to simplify the procedural process.¹³² One purpose of the rules was to liberalize the practice of trial courts and courts of appeal, to reduce technical burdens, not to increase them.¹³³ The courts and drafters of the rules have suggested that, in order for the rules to achieve the ends of orderly and speedy jurisprudence, the rules should be liberally construed.¹³⁴ A broad construction of the rules would allow every litigant the opportunity to have his day in court. Trial rule 13 is no exception.

Such a liberal interpretation is supported by trial rule 1, which expressly states that the trial rules "shall be construed to secure the just . . . determination of every action."¹³⁵ Other trial rules also suggest that this approach would comply with the basic policy of the rules. Rule 6 allows a defendant a time period within which to file a responsive pleading.¹³⁶ Rule 13 requires that compulsory counterclaims be asserted in the responsive pleading.¹³⁷ To deny the defendant the opportunity to seek full recovery under a counterclaim that is not barred at the time the plaintiff initiates the action denies the defendant the full time within which he is authorized to file a responsive pleading.¹³⁸ Tolling the statute of limitations for the compulsory counterclaim, in contrast, allows the defendant his day in court. The tolling approach thus provides the defendant the rights and benefits of the trial rules and is therefore entirely consistent with the overall philosophy of the rules.¹³⁹

Additionally, the purpose of trial rule 13(J) is more correctly reflected in the tolling approach. In a jurisdiction that adopts the tolling approach, the defendant is allowed to assert the counterclaim if it was not barred when the plaintiff instituted the suit, thus receiving the benefit of the tolling of the limitations period in regard to his counterclaim. If the defendant's counterclaim was already barred when the plaintiff filed his complaint, trial rule 13(J) nevertheless allows the defendant to defeat or diminish the plaintiff's claim.¹⁴⁰ According to Wright and Miller,

¹³²*Southern Ind. Rural Elec. Coop. v. City of Tell City*, 179 Ind. App. 217, 384 N.E.2d 1145 (1979).

¹³³*See Perry v. Baron*, 152 Ind. App. 29, 281 N.E.2d 544 (1972).

¹³⁴*See American States Ins. Co. v. State ex rel. Jennings*, 152 Ind. App. 422, 284 N.E.2d 873 (1972).

¹³⁵IND. R. TR. P. 1, which states:

Except as otherwise provided, these rules govern the procedure and practice in all courts of the State of Indiana in all suits of a civil nature whether cognizable as cases at law, in equity, or of statutory origin. They shall be construed to secure the just, speedy and inexpensive determination of every action.

¹³⁶IND. R. TR. P. 6(C) states that "[a] responsive pleading required under the rules, shall be served within twenty [20] days after service of the prior pleading."

¹³⁷IND. R. TR. P. 13(A).

¹³⁸*See supra* note 136.

¹³⁹*See supra* notes 132-34 and accompanying text.

¹⁴⁰*See* IND. R. TR. P. 13(J).

although the defendant cannot seek affirmative relief on his counterclaim, courts have properly held that the defendant may assert a counterclaim to the extent that it defeats or diminishes the plaintiff's recovery.¹⁴¹ This interpretation makes the rule entirely consistent with rule 13 as a whole because rule 13(J) is not applicable if the counterclaim could have been asserted at the time the plaintiff initiated the action.

D. Purposes Served by the Statute of Limitations Are Not Defeated by Allowing the Untimely Claim

The argument that the purpose of the statute of limitations would be defeated by allowing untimely counterclaims to be litigated may be misleading.¹⁴² Indiana holds that limitation statutes are statutes of repose.¹⁴³ These statutes are favored by the courts, but are not intended to be construed so as to reach absurd results.¹⁴⁴ The primary purpose of such statutes is to ensure that parties are given formal and reasonable notice that a claim is being asserted against them¹⁴⁵ and to prevent the assertion of stale or fraudulent claims.¹⁴⁶ The purpose of the statute of limitations would not be defeated by litigating the untimely compulsory counterclaim.

If the object of the statute of limitations is to give formal notice to all parties that a claim is being asserted against them,¹⁴⁷ this purpose is fulfilled when the plaintiff files the action before the expiration of the applicable limitations period. As long as the plaintiff's action is timely, whether the action was filed immediately after the accident or occurrence or on the last day of the statutory period, this objective is met once the defendant receives notice. As long as the defendant receives notice, it is irrelevant whether he receives it after the expiration of the limitations period. There is subsequently little justification for barring the defendant's claim because both parties then have reasonable notice of the timely filed action.

When the plaintiff asserts the original action, he has demonstrated that he does not desire to lay to rest the underlying transaction or occurrence. Because the plaintiff's claim is not considered stale if it is

¹⁴¹C. WRIGHT & A. MILLER, *supra* note 35, § 1419, at 110 (1971).

¹⁴²See *Crivaro*, 469 N.E.2d at 1184.

¹⁴³See *Kemper v. Warren Petroleum Corp.*, 451 N.E.2d 1115 (Ind. Ct. App. 1983); *Indiana Dep't of State Revenue v. Estate of Puett*, 435 N.E.2d 298 (Ind. Ct. App. 1982); *Bennett v. Bennett*, 172 Ind. App. 581, 361 N.E.2d 193 (1977).

¹⁴⁴See *Hamrick v. Indianapolis Humane Soc'y, Inc.*, 174 F. Supp. 403 (S.D. Ind. 1959), *aff'd*, 273 F.2d 7 (7th Cir. 1959), *cert. denied*, 362 U.S. 919 (1959).

¹⁴⁵See *State ex. rel Young v. Noble Circuit Court*, 263 Ind. 353, 332 N.E.2d 99 (1975).

¹⁴⁶See *In re M.D.H.*, 437 N.E.2d 119 (Ind. Ct. App. 1982).

¹⁴⁷See *supra* note 145.

filed before the applicable statute of limitations, it is illogical to say that the defendant's counterclaim, arising out of the same incident, is stale simply because it is filed some time later. As long as the defendant's counterclaim arises from the same transaction or occurrence, it should be no more stale than the plaintiff's claim.¹⁴⁸ The court's initial inquiry should thus be limited to matters directly related to that event which triggered the plaintiff's claim. Any concern for potentially stale evidence regarding the defendant's counterclaim is minimal if evidence of the same transaction or occurrence is not stale as to the plaintiff's claim.¹⁴⁹ This necessarily close relationship between the timely claim and the untimely counterclaim ensures that the latter is not stale in the sense that evidence and witnesses are no longer available;¹⁵⁰ the evidence is equally available for adjudicating all claims arising out of the same transaction or occurrence.

Allowing a party in a motor vehicle collision to wait until the last moment to file a complaint in hopes of evading liability or reducing the extent of exposure on a counterclaim only encourages last minute filing of claims.¹⁵¹ Such a policy cannot be rationalized as consistent with the purposes of statutes of limitations.¹⁵² Allowing the defendant to assert the compulsory counterclaim may, in fact, reduce the filing of fraudulent claims by plaintiffs. A plaintiff would be less likely to assert a fraudulent claim near the end of the applicable statute of limitations if it were clear that the defendant would be allowed to counter the plaintiff's claim and seek affirmative recovery.

Allowing the defendant to assert the time-barred claim thus promotes justice and efficiency. All interested parties are likely to have notice of any counterclaim filed in response to the original claim, and evidence regarding the underlying transaction or occurrence is equally available for litigating both claims. In addition, allowing the defendant's counterclaim reduces fraudulent claims and removes any incentive for attorneys to postpone filing the original complaint until shortly before the statute of limitations runs.

E. Potential for an Independent Action Should Not Bar the Counterclaim

The *Crivaro* court suggested that if the defendant had a meritorious claim, he should have initiated an independent action.¹⁵³ However, the

¹⁴⁸See *Armstrong v. Logsdon*, 469 S.W.2d 342, 343 (Ky. Ct. App. 1971).

¹⁴⁹*Id.*

¹⁵⁰C. WRIGHT & A. MILLER, *supra* note 35, § 1419, at 109, 110 (1971).

¹⁵¹Brief of Appellant at 10-11, *Crivaro*, 469 N.E.2d 1184 (Ind. Ct. App. 1984).

¹⁵²*Id.*

¹⁵³469 N.E.2d at 1187 nn. 7,8.

failure of a defendant to assert an independent action does not mean that his claim lacks merit.¹⁵⁴ A defendant's inaction may be the result of several factors. It may reflect an uncounseled ignorance of the law regarding his rights and privileges.¹⁵⁵ The defendant may also have intended to lay the matter to rest, an intention that was unexpectedly altered by the filing of the plaintiff's claim.¹⁵⁶ Additionally, the defendant may be completely surprised that the plaintiff would bring any action based upon the particular incident. Yet, regardless of the specific reasons why a defendant chose not to assert an independent action, as long as none of the policies underpinning the statute of limitations are defeated, the potentially meritorious counterclaim should be litigated in the same proceeding.

F. Justice and Fairness Would Best Be Served by Adjudicating the Untimely Counterclaim.

The policies of justice and fair play would best be served by allowing the adjudication of both the plaintiff's timely claim and the defendant's untimely counterclaim. The defendant's counterclaim should, of course, be brought within a reasonable time during the pendency of the lawsuit.¹⁵⁷ Simple justice dictates that if the plaintiff has the opportunity to present a claim based on a particular event, the defendant should not be prevented from having his claim adjudicated because of a mere technicality.¹⁵⁸ After all, it is the defendant who is being hauled into court against his will by the plaintiff.

Judicial and legislative action can mitigate the harshness of denying the defendant's counterclaim.¹⁵⁹ A majority of courts now hold that, where a plaintiff institutes an action in a timely manner, the running of the statute of limitations is tolled as long as the counterclaim was not barred at the commencement of the plaintiff's action.¹⁶⁰ Legislatures have enacted statutes to the same effect.¹⁶¹

The *Crivaro* court declined the invitation to adopt a tolling rule, for it perceived such action as judicial legislation.¹⁶² Yet, it is the Indiana

¹⁵⁴Although *Crivaro* was seeking \$60,000 in damages compared to *Rader's* \$1,000, the court is the proper forum to determine the validity of each claim. *See id.* at 1187. *See generally* *Foster v. New*, 407 N.E.2d 271 (Ind. Ct. App. 1980). "The complaint is not subject to dismissal unless it appears to a certainty that [a party] would not be entitled to relief under any set of facts." *Id.* at 273 (citation omitted).

¹⁵⁵*See Sobieski, supra* note 37, at 293-94.

¹⁵⁶*Id.* at 294.

¹⁵⁷*See* *Wallace v. Patterson*, 85 Mich. App. 266, 271 N.W.2d 194 (1978), *rev'd on other grounds*, 405 Mich. 825, 289 N.W.2d 924 (1979).

¹⁵⁸*See* *Armstrong v. Logsdon*, 469 S.W.2d 342, 343 (Ky. Ct. App. 1971).

¹⁵⁹*See supra* notes 14 and 49-56 and accompanying text.

¹⁶⁰*See supra* note 36.

¹⁶¹*See supra* notes 49-56 and accompanying text.

¹⁶²469 N.E.2d at 1187 (quoting *Di Norscia*, 50 Del. at 120, 124 A.2d at 717).

Supreme Court's prerogative to establish Indiana procedural rules.¹⁶³ The Indiana General Assembly has reaffirmed this inherent power of the state supreme court to adopt, amend and rescind rules affecting matters of procedure and practice.¹⁶⁴ Thus, the Indiana Supreme Court could pass on this most important issue either directly or on appeal from the lower courts. If the Indiana courts decline to adopt a tolling rule, the legislature could enact such a statute to remedy the present situation, as it is the legislature that has the authority to adopt or amend statutes of limitation.¹⁶⁵

V. SUGGESTED STATUTORY RESPONSE

State legislatures have enacted statutes that allow the defendant to assert a counterclaim after the expiration of the applicable statute of limitations if the counterclaim was not barred at the time the original complaint was filed.¹⁶⁶ The statutes make no distinction as to the type of relief sought or the type of action from which the claim arose¹⁶⁷ and allow the defendant to assert an untimely compulsory counterclaim.¹⁶⁸ Such statutes have been upheld on judicial review. In Indiana, however, the Rules of Trial Procedure are silent regarding how to deal with an untimely compulsory counterclaim.¹⁶⁹ The courts have held that the untimely counterclaim may not be litigated, but the rationale for this result seems to conflict with the policies behind the procedural rules and statutes of limitation.¹⁷⁰

A statute broad enough to allow the defendant to assert any claim that arises out of the same transaction or occurrence that gave rise to the plaintiff's action¹⁷¹ would be consistent with trial rule 13. The defendant should, however, be required to assert his claim within a reasonable time after receiving notice of the plaintiff's claim.¹⁷² Additionally, the statute should require that the defendant's claim be ac-

¹⁶³See *Otterman v. Industrial Bd., Violent Crime Compensation Div.*, 473 N.E.2d 1021 (Ind. Ct. App. 1985). "[I]t is the exclusive prerogative of the Indiana Supreme Court to establish procedural rules governing the course of litigation, and any legislative enactment which infringes upon that prerogative must yield." *Id.* (citations omitted).

¹⁶⁴See IND. CODE § 34-5-1-2 (West 1983).

¹⁶⁵*Crivaro*, 469 N.E.2d 1184.

¹⁶⁶See *supra* note 49.

¹⁶⁷See *id.* and accompanying text.

¹⁶⁸See *Benckendorf v. Burlington N. R.R.*, 112 Ill. App. 3d 658, 445 N.E.2d 837 (1984); *Seligson v. Chase Manhattan Bank, Nat'l Ass'n.*, 50 A.D.2d 206, 376 N.Y.S.2d 899 (1975).

¹⁶⁹See generally IND. R. TR. P. 13.

¹⁷⁰See *supra* note 17 and accompanying text.

¹⁷¹See *supra* note 49 and accompanying text.

¹⁷²See generally IND. R. TR. P. 6(C). A reasonable time may be the twenty [20] day period required under the trial rules for responsive pleadings.

tionable when the plaintiff's complaint was filed. If the defendant's claim was not valid at that time, trial rule 13(J)(1) would apply to allow the defendant to assert a claim that arises out of the same transaction or occurrence and that seeks to diminish or defeat the opposing party's claim.¹⁷³ Thus, for all practical purposes, the suggested statute would effectively toll the limitations period as to the defendant's claim.

VI. CONCLUSION

A defendant should be allowed to assert a counterclaim in excess of the amount sought by the plaintiff so long as the claim was not barred by the applicable statute of limitations at the time the plaintiff's complaint was filed and the counterclaim arose out of the same transaction or occurrence as the plaintiff's action. The reasoning in *Crivaro* is not consistent with the purposes behind the statute of limitations. The policies of the statute of limitations are not related to the type of relief or the amount of recovery, but instead address only the question of the timeliness of the plaintiff's claim.

Present law in Indiana concerning the effect of the statute of limitations on compulsory counterclaims is in need of revision. The current focus of judicial analysis is on the type of relief sought in the counterclaim, but the rationale is often confusing and arguably incorrect in light of Indiana common law, the language and policies of the trial rules, and the purposes of statutes of limitation.

A tolling rule should be adopted by the Indiana Supreme Court or enacted by the legislature, with regard to statutes of limitation, to remedy this procedural problem. The rule should allow the assertion of the untimely counterclaim, regardless of the type or amount of relief sought, so long as both claims arose out of the same transaction or occurrence and the defendant's claim was not barred when the plaintiff's claim was interposed. The counterclaim should, however, be filed within a reasonable time during the pendency of the lawsuit. Such a response by the Indiana Supreme Court or the legislature would lead to fairer procedural jurisprudence in Indiana.

JOHN R. GASKIN

¹⁷³See IND. R. TR. P. 13(J).