

PROPOSED AMENDMENT OF MCR 2.203 [JOINING ADDITIONAL PARTIES]

Issue

Should the State Bar of Michigan adopt the following proposal to add (G) to Rule 2.203 of the Michigan Court Rules:

(G) Joining Additional Parties

(1) Persons Who May Be Joined. Persons other than those made parties to the original action may be made parties to a counterclaim or cross-claim, subject to MCR 2.205 and 2.206.

(2) Summons. On the filing of a counterclaim or cross-claim adding new parties, the court clerk shall issue a summons for each new party in the same manner as on the filing of a complaint, as provided in MCR 2.102(A)-(C). Unless the court orders otherwise, the summons is valid for 21 days after the court issues it.

Synopsis

The Michigan Court Rules currently lack an express mechanism by which to add parties to a counterclaim or third-party claim and which calls for issuance of a summons by the clerk. This is a recognized “gap” in the rules which this proposal seeks to fill, consistent with existing practice.

Background

This proposal, suggested by the Civil Procedure & Courts Committee, is made to address a known and recognized “gap” in the Michigan Court Rules.

This issue is how a defendant adds new parties to the lawsuit. The language within MCR 2.204 (“...a defending party, as a third-party plaintiff, may serve a summons and complaint on a person not a party to the action who is or may be liable to the third-party plaintiff for all or part of the plaintiff’s claim.”) has led to arguments that the third-party complaint mechanism should be strictly limited to secondary liability claims. Yet there is often a need to add parties by way of counterclaim or third-party complaint. There is arguably the means to join an additional party as a “counter-defendant” pursuant to MCR 2.206(A)(2), which states:

(A) Permissive Joinder.

(2) All persons may be joined in one action as defendants

(a) if there is asserted against them jointly, severally, or in the alternative, a right to relief in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if a question of law or fact common to all of the defendants will arise in the action; or

(b) if their presence in the action will promote the convenient administration of justice.

MCR 2.206(A)(2). However, there is no express, corresponding Court Rule to permit the defendant to obtain a summons against the “counter-defendant.” See MCR 2.102(A)(governing issuance of a summons upon the filing of a **complaint**, not a counterclaim). Without a summons, a new party cannot technically be served. Moreover, the rule does not address third-party practice.

Federal practice has long permitted parties to be added in counterclaims and third party claims, consistent with regular joinder rules. The absence of such a rule under the Michigan Court Rules has been noted by commentators as something which should be corrected.¹

The other possibility would be to simply file an entirely new complaint (by the defendant in the original action against the parties to be added, in addition to a counterclaim in the original action), and then seek consolidation. This path, however, has been rightly criticized as overly formulaic, leads to a multiplicity of actions and pleadings and wastes resources.²

The proposal simply modifies MCR 2.203(G) to expressly provide authority for the adding of parties to counter-claims and provide the corresponding authority for issuance of a summons.

The proposal was reviewed by the Committee over several sessions and revisions were made. The final proposal was unanimously passed.

Opposition

None known.

Prior Action by Representative Assembly

None known.

¹ See Ronald S. Longhofer, *Michigan Court Rules Practice* (5th Ed. 2004), §2203.1. “Another difference between the Michigan and federal rules involves the additional of nonparties to counterclaims and cross-claims. Under Federal Rule of Civil Procedure 13(h), ‘persons other than those made parties to the original actions may be made parties to a counterclaim or cross-claim.’ **There is no parallel provision under the MCR, and thus a defendant’s ability to add additional counterclaim or cross claim defendants is unclear.** We recommend that MCR 2.203 be amended to adopt a provision similar to Federal Rule of Civil Procedure 13 (h), in the interest of clarifying that nonparties may be joined as additional counterclaim or cross-claim defendants in order to dispose of an entire controversy in a single proceeding.” (Note: Fed. R. Civ. P. 13(h) was amended after the publication of this treatise, so the language cannot be simply imported into the MCRs.)

² See Michigan Civil Procedure (Kathleen A. Lang et al eds, ICLE 2d ed 2012) §7.55: “Although not common [for a defendant to add new parties to a counterclaim], the practice does occur, and the Michigan Court Rules should be amended to provide clarity for the courts, parties, and court administrators and clerks on this issue. Otherwise, the party seeking to add additional defendants on a counterclaim may be required to undertake the burdensome process of filing a separate action on the same bases against the new parties, filing a counterclaim against the existing party, and then seeking to consolidate the cases.”
{90000/50/DT746235.DOC;1}

Fiscal and Staffing Impact on State Bar of Michigan

None.

**STATE BAR OF MICHIGAN POSITION
By vote of the Representative Assembly on April 27, 2013**

Should the Representative Assembly adopt the above resolution regarding MCR 2.203?

(a) Yes

or

(b) No