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COURT OF APPEALS
STATE OF NEW YORK

PARAMOUNT PICTURES CORPORATION,

Appellant,

-against-

No. 16

ALLIANZ RISK TRANSFER AG,

Respondent.

20 Eagle Street
Albany, New York
January 10, 2018

Before:

CHIEF JUDGE JANET DIFIORE
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE LESLIE E. STEIN
ASSOCIATE JUDGE EUGENE M. FAHEY
ASSOCIATE JUDGE MICHAEL J. GARCIA
ASSOCIATE JUDGE ROWAN D. WILSON
ASSOCIATE JUDGE PAUL FEINMAN

Appearances:

RICHARD B. KENDALL, ESQ.
KENDALL BRILL & KELLY LLP
Attorney for Appellant
10100 Santa Monica Boulevard
Suite 1725
Los Angeles, CA 90067

JAMES A. JANOWITZ, ESQ.
PRYOR CASHMAN LLP
Attorney for Respondent
Seven Times Square
New York, NY 10036

Sara Winkeljohn
Official Court Transcriber



1 CHIEF JUDGE DIFIORE: First matter on this
2 afternoon's calendar is appeal number 16, Paramount v.
3 Allianz.

4 Counsel.

5 MR. KENDALL: May it please the court, I'm
6 Richard Kendall, counsel for petitioner Paramount Pictures.
7 May I reserve three minutes for rebuttal?

8 CHIEF JUDGE DIFIORE: You may, sir.

9 MR. KENDALL: The New York Legislature, when
10 enacting the CPLR deliberately rejected the compulsory
11 counterclaim rule.

12 JUDGE STEIN: But are there some circumstances in
13 which we - - - we would have to apply federal law?

14 MR. KENDALL: Not the Federal Rules of Civil
15 Procedure.

16 JUDGE STEIN: Well, let me - - - let me ask you
17 this. What - - - what was the basis for federal court's
18 jurisdiction in this case?

19 MR. KENDALL: Supplemental jurisdiction.

20 JUDGE GARCIA: Wasn't there a federal question?

21 MR. KENDALL: There was in the Securities Act
22 claim but not in the fraud claim under - - -

23 JUDGE GARCIA: Why isn't - - - why aren't we
24 applying res judicata to the federal question claim?

25 MR. KENDALL: Because the federal question is not



1 before the court. The only question that's before the
2 court is - - -

3 JUDGE GARCIA: Well, what's before the court is
4 the effect of the federal judgment, right?

5 MR. KENDALL: That is correct.

6 JUDGE GARCIA: And isn't the effect of the
7 federal judgment a judgment on a federal question claim?

8 MR. KENDALL: There is - - - if - - - if we were
9 at this point bringing a securities claim or something else
10 that was a federal claim. And - - -

11 JUDGE GARCIA: Well, why would you bring that in
12 state court? You're bringing an action in state court, and
13 what we're looking to is the preclusive effect of the
14 federal judgment.

15 MR. KENDALL: That's correct.

16 JUDGE GARCIA: And one of the counts - - - one of
17 the claims is a federal question. So doesn't Semtek and
18 Taylor, don't those cases tell us we have to apply federal
19 res judicata?

20 MR. KENDALL: No, to the contrary Semtek says the
21 opposite here. So first of all - - -

22 JUDGE GARCIA: In a diversity claim.

23 MR. KENDALL: And a supplemental jurisdiction
24 claim is no different.

25 JUDGE GARCIA: Yeah, but not a federal question



1 claim.

2 MR. KENDALL: Right, but we're - - - we're not
3 here talking about a federal question claim.

4 JUDGE GARCIA: But I think we have to talk about
5 it.

6 MR. KENDALL: I respectfully disagree. Here's
7 why. So first of all, under the Semtek decisions and the
8 Rules Enabling Act, the question to be posed is what is the
9 effect of a federal judgment that is addressing a state law
10 claim? There is no full faith and credit - - -

11 JUDGE GARCIA: But - - - but that's because
12 Semtek only had a diversity claim. Semtek doesn't - - -
13 Semtek, in fact, and Taylor say when you have a federal
14 question claim it's all federal interest. In a diversity
15 claim, the Supreme Court will let you apply the local res
16 judicata law of the forum state.

17 MR. KENDALL: Oh, but that's also true for a
18 supplemental jurisdiction claim.

19 JUDGE GARCIA: Right, but not for federal
20 question claims, and you have a federal question claim here
21 - - -

22 MR. KENDALL: Yes, but - - -

23 JUDGE GARCIA: - - - in the judgment.

24 MR. KENDALL: - - - with respect, our counterclaim
25 is not founded on the securities laws.



1 JUDGE GARCIA: And that makes a difference as to
2 the preclusive effect of a federal judgment?

3 MR. KENDALL: Yes, it does because our
4 counterclaim is founded in contract. It is purely a state
5 law claim.

6 JUDGE STEIN: But would it apply to the Federal
7 Securities Law? In other words, would it bar suit on that
8 federal securities claim?

9 MR. KENDALL: A - - -

10 JUDGE STEIN: Covenant not to sue?

11 MR. KENDALL: The covenant not to sue clause, we
12 could have argued below, would have barred both the state
13 claim and the federal claim.

14 JUDGE GARCIA: So under Rule 13 it was a
15 compulsory counterclaim in federal court?

16 MR. KENDALL: Well, obviously, there - - -

17 JUDGE GARCIA: Just pure Rule 13.

18 MR. KENDALL: Let's assume for a moment that Rule
19 13 did apply.

20 JUDGE GARCIA: Right.

21 MR. KENDALL: Under the Second Circuit law - - -
22 which I will agree is not entirely settled on the point
23 because there's never been a covenant not to sue claim
24 that's been adjudged to be a compulsory counterclaim in the
25 Second Circuit. The argument as to compulsory counterclaim



1 in the Second Circuit law would be, was this a claim that
2 existed prior to the actual filing of the complaint?
3 Because that's where the Second Circuit has drawn the line
4 up until now. So I would submit this was not a compulsory
5 counterclaim under federal law. But where I take issue,
6 Your Honor, is on the question of whether it makes any
7 difference for the application of the Federal Rules of
8 Civil Procedure to a New York State action that the
9 original claim was a federal question claim - - -

10 JUDGE GARCIA: But you're - - -

11 MR. KENDALL: - - - and here's why.

12 JUDGE GARCIA: You're kind of answering the
13 question that way. But I think my issue really is you've
14 got a federal question claim which you - - - was in the
15 federal action. It's part of the federal judgment. We're
16 looking to the preclusive effect of the federal judgment.
17 I think it's mandated by the Supreme Court rules of Semtek
18 and Taylor that we apply federal preclusion law to the
19 federal claim, and it's the same action, as Judge Stein was
20 saying, that you're bringing here that would have been,
21 arguably, we have to decide, a compulsory counterclaim to
22 the federal question. So to say we only apply New York Law
23 under Semtek and Taylor I think is problematic.

24 MR. KENDALL: So if - - - if I could respond.

25 The effect of Rule 13(a) is not preclusion. That is a



1 housekeeping rule in the federal courts. So - - -

2 JUDGE GARCIA: It's a res judicata rule.

3 MR. KENDALL: No, it is not a res judicata rule.
4 It is a rule of procedure.

5 JUDGE GARCIA: There's no self-executing
6 mechanism in Rule 13, we agree, for preclusion. In fact,
7 the drafters at some point say we can't do that. So if you
8 look at, to me, the federal case law applying Rule 13,
9 there's almost two ways they do it. They do it on a
10 "housekeeping rule", let's call it. It's Rule 13, it's
11 Rule 13. But they do it in terms of a res judicata
12 analysis which is I think exactly what the Supreme Court is
13 telling us we have to do here. So there's two ways you can
14 look at that.

15 MR. KENDALL: I would argue - - -

16 JUDGE GARCIA: You could look at it as the rule
17 drives the res judicata or this is a common law of res
18 judicata that we have to apply.

19 MR. KENDALL: So let's begin with first
20 principles. The first principle is the Federal Rules of
21 Civil Procedure must not alter the effect of state law on
22 the petitioner's ability to bring this state law claim. It
23 is clear from the delegation that Congress made to the
24 Supreme Court to promulgate the rules. It is clear from
25 the advisory committee commentary in establishing the rules



1 and it is clear from the case law. So let give you an
2 example. If you were correct, the Douglas case - - -

3 JUDGE GARCIA: But give me an example of where
4 the enabling act has invalidated a Federal Rule of Civil
5 Procedure.

6 MR. KENDALL: So let's take the - - - the Douglas
7 v. NC - - - NC - - - the Douglas Bank case, NCNB Texas
8 State Bank. That is a case that was in federal court. I
9 believe it was a federal question case. And then the
10 question that arose was whether under Texas law the
11 defendant having passed on his counterclaim in the federal
12 court could nevertheless bring a Texas proceeding in order
13 to pursue a counterclaim that had been unasserted in the
14 federal case. Held under the Rules Enabling Act, yes,
15 absolutely has that right because principles of federalism
16 as well as the very delegation of authority in the - - -

17 JUDGE GARCIA: What year is that case?

18 MR. KENDALL: It is 1992.

19 JUDGE GARCIA: Right, so it's before Semtek.

20 MR. KENDALL: It's before Semtek, but of course
21 it's not altered by Semtek as Semtek simply takes the
22 clarity in its reasoning to explaining why principles - - -

23 JUDGE GARCIA: But Semtek is basically saying
24 that's wrong. You're applying federal res judicata law to
25 federal questions. You're enabling act issue is different



1 but it seems to me there's two ways to look at that. You
2 could say it's the rule driving the preclusive effect but
3 that kind of has become res judicata law. Or you could say
4 under the, like, restatement rule the rule kind of is
5 incorporating a common law view of res judicata.

6 MR. KENDALL: Where - - - where I take issue is
7 the following. Under Federal Common Law which applies in
8 this case you have to look to the state law under the Erie
9 doctrine - - -

10 JUDGE GARCIA: That's wrong, though. I think
11 that's a fundamentally wrong proposition. I think under
12 Semtek and Taylor you do that for diversity cases. But
13 under federal question cases - - - and you only do that
14 because the Supreme Court says you can and it doesn't
15 conflict with the federal interest. But under federal
16 question cases, you apply Federal Common Law.

17 MR. KENDALL: I - and - - - and where we disagree
18 is when there's supplement jurisdiction involved the
19 question must be answered differently because supplemental
20 jurisdiction claims are governed by the state law.

21 JUDGE GARCIA: So you think that - - - your
22 position would be that if you have both even under a
23 supremacy federal courts just allow us to give this what
24 preclusive effect they deem appropriate; the state law
25 would trump the Federal Common Law?



1 MR. KENDALL: In fact, I would go further,
2 although I don't need to, and I would say in a New York
3 State Court a defendant, because of the considered view of
4 the New York Legislature, is entitled to bring a
5 counterclaim that arose that could have been asserted in
6 federal court and is now entitled to bring it as a
7 plaintiff notwithstanding whether the original case was a
8 federal question case or a diversity case. However - - -

9 JUDGE GARCIA: So we could ignore the Supreme
10 Court's rule in Semtek, the legislature could?

11 MR. KENDALL: I don't think that the Supreme
12 Court ever says in Semtek that a federal question case
13 carries Rule 13(a) or any of the other federal rules to the
14 point of invalidating contrary state law with respect to
15 judgments.

16 JUDGE WILSON: I - - - I think that your position
17 is that Rule 13(a) and Federal Common Law of res judicata
18 are distinct?

19 MR. KENDALL: They are distinct.

20 JUDGE WILSON: So under - - - forget Rule 13(a)
21 for a moment, under the Federal Common Law of res judicata,
22 or claim preclusion or issue preclusion, what is the - - -
23 what would the result be?

24 MR. KENDALL: The Federal Common Law then looks -
25 - -



1 JUDGE WILSON: As - - - as to your counterclaim.

2 MR. KENDALL: It looks to Erie. It also looks to
3 state law in the same way it would as a diversity claim.
4 State law of res judicata as enacted by the New York
5 legislature allows permissive counterclaims, modifies the
6 application - - -

7 JUDGE WILSON: You're - - - you're then saying -
8 - - I'm sorry. So just to stop you, you're saying the
9 Federal Common Law of res judicata incorporates the state
10 law?

11 MR. KENDALL: That's correct.

12 JUDGE WILSON: So you're saying it doesn't - - -
13 that Judge Garcia's questions don't make any difference to
14 you whether - - - even if he's right that the Supreme Court
15 has said the federal law of res judicata governs in federal
16 questions that happens to be whatever the law of the forum
17 state was?

18 MR. KENDALL: That's correct, although I don't
19 have to go quite that far because we have a supplemental
20 jurisdiction claim - - -

21 JUDGE GARCIA: But what do you do with this line
22 from Taylor that says, Supreme Court, "For judgments in
23 federal question cases, federal courts participate in
24 developing uniform federal rules of res judicata which the
25 court has ultimate authority to determine and declare"?



1 MR. KENDALL: I agree with you as to res
 2 judicata, but we don't have - - - I - - - I prefer the term
 3 claim preclusion. We don't have a claim preclusion problem
 4 here. If Paramount was seeking to take a position contrary
 5 to what was established in the federal case, in the federal
 6 question, then of course you'd be correct, Judge Garcia.
 7 But Paramount is not taking a position that is inconsistent
 8 in any way or precluded as a matter or claim preclusion in
 9 any way by what happened in the federal case. In fact, the
 10 opposite is true. Paramount is simply seeking to enforce
 11 rights that were established in its favor in the federal
 12 case.

13 JUDGE STEIN: Well, although it's not before us
 14 there could be issue preclusion problems, could there not?

15 MR. KENDALL: Well, I think the issue preclusion
 16 will run in our favor but I agree, Judge Stein, that it's
 17 not before you at this point. That will happen when we go
 18 back to the trial court, and then the issue - - - the - - -
 19 the scope of our issue preclusion will obviously be
 20 something that the Supreme Court will have to address.

21 JUDGE RIVERA: Can - - - can you cite to any case
 22 where a party who's seeking attorneys' fees can - - - upon
 23 the completion of the underlying merits case then start a
 24 separate action for attorneys' fees?

25 MR. KENDALL: Yes. So a case in this state,

1 McMahan v. Bass, 250 A.D.2d 460 (1st Dept. 1998). I - - -
2 I have to be clear that it wasn't addressed it was just
3 assumed, so there's no reasoning analyzing the point. In a
4 case, Stroock & Stroock & Lavan, 2001 WestLaw 1682878, that
5 we cited in our brief, which is a 2001 case from the
6 Supreme Court, Justice - - -

7 JUDGE RIVERA: Wouldn't - - - wouldn't such a
8 separate action require that the judge not only rule on
9 sort of other aspects of the merits of the attorneys' fees
10 claim but also on some aspects of the original action to
11 determine whether or not the request for fees is warranted?

12 MR. KENDALL: I - - -

13 JUDGE RIVERA: Including the amount?

14 MR. KENDALL: I do not - - -

15 JUDGE RIVERA: And wouldn't that mean another
16 judge in another action, perhaps as you're arguing here in
17 a different jurisdiction, is looking over the shoulder of
18 the judge in the courts in that other jurisdiction?

19 MR. KENDALL: So I would agree that there could
20 be a question as to whether the fees expended were
21 reasonable, so that could be a factual issue. That is
22 definitely the tail of the dog, however. And if you
23 contrast that, if you think about the - - - why do we have
24 permissive counterclaims, contrast that with the situation
25 that would have arisen if Paramount had, A, had to submit



1 to discovery while defending a case as to the
2 reasonableness of its attorneys' fees that it was incurring
3 while defending and then had to - - -

4 JUDGE RIVERA: Well, but courts - - -

5 MR. KENDALL: - - - put evidence - - -

6 JUDGE RIVERA: Courts don't look at the
7 attorneys' fees at that moment. They look at it, of
8 course, after you've succeeded on the underlying claims.

9 MR. KENDALL: Well, but - - -

10 JUDGE RIVERA: Because you're not entitled to
11 attorneys' fees otherwise.

12 MR. KENDALL: If - - - no, that's - - - that's
13 incorrect in the covenant not to sue context. So normal -
14 - - the - - - the paradigm example is you have an
15 attorneys' fees clause, prevailing party wins attorneys'
16 fees. Then, Judge Rivera, you're absolutely right. But
17 suppose we had brought a counterclaim for breach of the
18 covenant not to sue. At the time we would have had to do
19 that we wouldn't have known that we ultimately ended up
20 with a bench trial. We would have been - - -

21 JUDGE STEIN: But why would you need to know
22 that? The - - - the covenant not to sue says you are not
23 subject to suit. So somebody brings a suit against you and
24 you say you're not allowed to do this and if - - - and if
25 you do, we're entitled to counsel fees.



1 MR. KENDALL: But the - - -

2 JUDGE STEIN: And then the case goes forward and
3 then when you get to some point in the - - - in the trial
4 you have - - - you have that issue.

5 MR. KENDALL: But there's a reasonable strategic
6 judgment not to litigate an affirmative claim - - -

7 JUDGE STEIN: Well, there may be, but it's not a
8 matter of being unable to bring that claim.

9 MR. KENDALL: Oh, I agree.

10 JUDGE STEIN: I thought that's the point you were
11 making.

12 MR. KENDALL: Oh, no, no, no.

13 JUDGE STEIN: I misunderstood you. I'm sorry.

14 MR. KENDALL: No, I - - - I would - - -

15 JUDGE STEIN: Okay.

16 MR. KENDALL: Far from me to suggest unable. I
17 am saying that the New York legislature has validated the
18 choice of a defendant to prosecute later and defend now.

19 CHIEF JUDGE DIFIORE: Thank you, counsel.

20 MR. KENDALL: Thank you.

21 CHIEF JUDGE DIFIORE: Counsel.

22 MR. JANOWITZ: Good afternoon, Your Honors. My
23 name is James A. Janowitz. I'm with Pryor Cashman and - -
24 -

25 JUDGE STEIN: Counsel, did - - -



1 MR. JANOWITZ: - - - we represent Allianz.

2 JUDGE STEIN: Sorry. Do - - - do you agree that
3 there's a different result if - - - if the case in federal
4 court was exclusively a federal question or if it had been
5 exclusively a diversity jurisdiction?

6 MR. JANOWITZ: Yes, I do. I do believe - - -

7 JUDGE STEIN: Okay.

8 MR. JANOWITZ: I do believe there is a
9 difference. I believe - - -

10 JUDGE STEIN: Okay. So how - - - so how do we
11 address this situation when you have both?

12 MR. JANOWITZ: Well, we - - - I don't think we
13 have both here.

14 JUDGE STEIN: Or, well, supplemental jurisdiction
15 which is - - -

16 MR. JANOWITZ: Supplemental, I - - - I - - - you
17 know, I've read Semtek, I - - - I don't see supplemental
18 jurisdiction dealt with in Semtek. The way I see Judge
19 Scalia's decision in Semtek is you apply the federal common
20 law. Federal common law takes you down one of two, you
21 know, roads. Either in a diversity case you look to the
22 res judicata of the state or in a federal action case,
23 which this is and which this claim was really very much a
24 part of because it's part of the same documents that gave
25 rise to the litigation, you look to federal res judicata.



1 And federal res judicata is embodied in 13(a).

2 JUDGE GARCIA: Just a point on the record - - -
3 and I just - - - I'm not sure of the answer to this. Was
4 it purely supplemental or was there a finding that it was
5 both supplemental and diversity jurisdiction?

6 MR. JANOWITZ: I - - - I don't believe there was
7 a finding as - - - as to, you know, supplemental versus
8 federal. And I - - -

9 JUDGE GARCIA: Assume that there was both
10 supplemental/diversity and federal, just assume.

11 MR. JANOWITZ: I don't think it would make any
12 difference. I believe - - -

13 JUDGE GARCIA: You - - - you'd still apply
14 federal common law - - -

15 MR. JANOWITZ: Right.

16 JUDGE GARCIA: - - - because of the federal
17 claim.

18 MR. JANOWITZ: Well, you'd always apply - - -

19 JUDGE FAHEY: You cited - - -

20 MR. JANOWITZ: - - - federal common law.

21 JUDGE FAHEY: Excuse me.

22 JUDGE GARCIA: I'm sorry.

23 JUDGE FAHEY: You - - - you cited ten different
24 states that did - - - you said agreed with your position -
25 - -



1 MR. JANOWITZ: Yes.

2 JUDGE FAHEY: - - - in essence. Did any of them
3 have this particular twist where we had both?

4 MR. JANOWITZ: Well, it's funny you ask. There -
5 - - there was a case that I think is kind of interesting
6 that I just saw recently. It was just - - - it just came
7 down in 2017. It was one of the case - - - it - - - it
8 refers to one of the cases we cited, and this case is
9 called Dan Ryan Builders, 803 S.E.2d 519, 2017, in which
10 they refer to a case that had been decided before it called
11 Small v. Clawges. And they said that they needed to
12 correct their ruling in that case because they said the
13 ruling is correct, "Only to the extent it applies to
14 federal court rulings upon federal questions. It is wrong
15 when applied to rulings issued in diversity."

16 So this is a case in which more recently the
17 court has given it some additional consideration and
18 considered the implications of Semtek which had not been
19 part of the reasoning before. Although let me just say
20 that whether you go down the route of federal res judicata
21 which leads you to 13(a) or whether you go down the route
22 of state res judicata, at least in the State of New York,
23 you reach the same conclusion.

24 JUDGE RIVERA: Now why is that?

25 MR. JANOWITZ: Because - - - because they are



1 both transactional analyses, and so where you have a claim
2 that was part of the transaction that was in the federal
3 court in this case, it's barred.

4 JUDGE WILSON: But now aren't you - - -

5 MR. JANOWITZ: If it were not - - - if it were
6 not - - -

7 JUDGE WILSON: Aren't you then really saying that
8 the New York rule is a compulsory counterclaim rule?

9 MR. JANOWITZ: No, not at all.

10 JUDGE WILSON: Well, why not?

11 MR. JANOWITZ: What I'm saying is that - - -

12 JUDGE WILSON: Because you've said - - - wait a
13 minute, you've said that Rule 13(a) embodies the federal
14 law of res judicata.

15 MR. JANOWITZ: Correct.

16 JUDGE WILSON: 13(a) is the compulsory
17 counterclaim rule which is driven, as you say, from
18 transaction recurrence. If you say that is the same rule
19 that obtains in New York State - - - under New York State
20 Law you're essentially saying New York State has compulsory
21 counterclaim law.

22 MR. JANOWITZ: No, I'm not.

23 JUDGE WILSON: Why?

24 MR. JANOWITZ: Because New York State, if you
25 look at In Re: Hunter, which was decided by this court,



1 you'll see that New York has the same transactional res
2 judicata analysis as the federal court and that's what was
3 being applied here.

4 JUDGE WILSON: In - - - in 13(a).

5 MR. JANOWITZ: Whether you take it at 13(a) or
6 whether you take it in New York State - - it's - - -

7 JUDGE WILSON: Everybody understands 13(a) is the
8 compulsory counterclaim rule, no?

9 MR. JANOWITZ: Correct, Your Honor. But you
10 don't - - -

11 JUDGE WILSON: And you're saying it's the same as
12 what's here in New York?

13 MR. JANOWITZ: Well, I'm - - - I'm saying that
14 things equal to equal things are equal to each other.

15 JUDGE WILSON: Okay. That's what I'm saying,
16 too, I think.

17 MR. JANOWITZ: As - - - as I was saying I do not
18 believe that it makes a difference because the way that New
19 York State applies res judicata and the way the federal
20 courts apply res judicata is the same. Now it is true that
21 in the federal court you have a compulsory counterclaim,
22 and I do not believe that you are importing that compulsory
23 counterclaim. I believe what you're doing is you're
24 looking to the federal court which you need to do and being
25 guided by the federal - - - the federal rule which is



1 embodied in 13(a).

2 Mr. Kendall thinks that there is a problem, that
3 we're somehow doing violence to the permissive counterclaim
4 rule of the State of New York, and clearly, we have a
5 permissive counterclaim rule. But permissive counterclaim
6 rules don't mean anything goes. When New York decided to
7 have a permissive counterclaim rule rather than a
8 compulsory counterclaim rule, it provided guidance to
9 litigate - - - to litigants who were faced with the
10 decision of whether to assert a counterclaim in an action
11 brought in New York State court. This was not a rule
12 directed to parties defending cases in Michigan or
13 Connecticut or in the Federal District Court.

14 JUDGE STEIN: Is there a distinction between
15 affirmatively bringing a claim and - - - and what you're
16 required to do if you bring that claim so as not to be
17 vexatious or whatever, between that and making a choice or
18 a selection as to what defenses you assert to a claim that
19 somebody else has brought? Do you understand my question?

20 MR. JANOWITZ: I'm not sure I do. I - - -

21 JUDGE STEIN: Well - - - well, you know, the
22 transactional analysis, we say you can't come into court
23 and you can't bring claims and split your claims, right?

24 MR. JANOWITZ: Right.

25 JUDGE STEIN: But is - - - is it different when



1 you haven't brought a claim in the first instance at all,
2 you're defending a claim that someone else has brought, and
3 you are electing what defenses to assert to that claim?

4 MR. JANOWITZ: I understand.

5 JUDGE STEIN: Is it the same analysis?

6 MR. JANOWITZ: No, I think it's the same because
7 under the transactional analysis if you had a claim it - -
8 - it had to have been brought. Under transactional
9 analysis, it bars claims which were brought or which could
10 have been brought. That's the problem here.

11 JUDGE GARCIA: Let me ask it this way then. If
12 this original case had been brought in New York State
13 Court, and not obviously with the federal question issue
14 and same result, could they bring the counterclaim?

15 MR. JANOWITZ: If it had been brought in New York
16 State Court it certainly would have posed a different
17 issue. The issue then would have been an analysis under
18 the Henry Modell case. And whether or not by holding back
19 the claim for attorneys' fees and bringing in a second - -
20 - second action you would have impaired - - -

21 JUDGE GARCIA: Right.

22 MR. JANOWITZ: - - - the result of the first
23 action.

24 JUDGE GARCIA: That - - -

25 MR. JANOWITZ: I believe that - - -



1 JUDGE GARCIA: That is the rule essentially we
2 have to apply to the state law claims in federal court. So
3 to me it seems like we would be doing that exact same
4 analysis on a pure diversity claim, let's call it for these
5 purposes, and you would be allowed to bring the claim. So
6 the idea that state res judicata law in a diversity-type
7 situation gives you a different result is hard for me to
8 understand.

9 MR. JANOWITZ: I'm not saying that it does. I -
10 - - I believe if you were - - - I believe if you were
11 applying the Henry Modell analysis, hypothetically if you
12 were to do that, then you would find yourself asking
13 whether the bringing of the attorneys' fees claim in the
14 second action impaired the - - - the rights of the
15 litigants in the first.

16 JUDGE GARCIA: But it doesn't.

17 MR. JANOWITZ: It does.

18 JUDGE GARCIA: How would it impair it?

19 MR. JANOWITZ: Oh, I believe it does because in
20 order to go back, in order to make that decision you have
21 to go back and look at the first case because we have under
22 Artvale - - - we have an issue as to whether or not the
23 claims - - - the breach of the covenant was made in bad
24 faith, and that is an issue that must be decided. And it
25 is clear here where we had four dispositive motions going



1 to the waiver issue and - - - which is in the same sentence
2 as the covenant not to sue and the court decided implicitly
3 that these were not either obvious or made in bad faith,
4 you can't go back and say, well, now you can just go ahead
5 and do it and - - -

6 JUDGE GARCIA: Isn't that claim preclusion - - -

7 MR. JANOWITZ: - - - and avoid this issue.

8 JUDGE GARCIA: Isn't that a claim preclusion
9 issue?

10 JUDGE WILSON: Issue - - - issue - - - preclusion
11 issue, right.

12 JUDGE GARCIA: Like you wouldn't be able to
13 relitigate a particular issue that's already been decided.
14 But to me impairing the judgment goes to you litigate an
15 issue, let's say for title, you have a counterclaim that
16 would have given you title, you bring that as a separate
17 action. But if you win on a separate action it would
18 undermine the determination of the - - - I think that may
19 be a New York case. It would undermine the - - - the core
20 holding of the initial thing.

21 MR. JANOWITZ: I - - - I don't believe so.

22 JUDGE GARCIA: Here you just have issue
23 preclusion. You can't relitigate that issue.

24 MR. JANOWITZ: I - - - I understand what you're
25 saying. But first of all, I don't think impairment works



1 the way that you're suggesting. I think if you look at the
2 - - - the Dartmouth case it's a - - - I forget the
3 beginning of it, but the second - - - the second litigant
4 is Dartmouth. You will see that a different kind of
5 analysis was done.

6 JUDGE GARCIA: Language of the restatement is
7 "would nullify the initial judgment or would impair rights
8 established in the initial action." So how would - - - how
9 would this do that?

10 MR. JANOWITZ: Because you - - - you could - - -
11 you would have to go back. You couldn't decide this case
12 on its own. You couldn't decide it without going back to
13 the first - - - the facts of the first case and
14 relitigating some of those facts that were actually not
15 necessarily focused on explicitly in the first case.

16 JUDGE WILSON: But - - - but the judgment of - - -
17 -

18 MR. JANOWITZ: They were - - - they were focused
19 on implicitly.

20 MR. JANOWITZ: The judgment of the first case you
21 lose. I don't see how it gets any worse for you.

22 MR. JANOWITZ: Well, the - the issue is with
23 respect to the - - - the attorneys' fees claim whether or
24 not the covenant not to sue was violated in bad faith.
25 That is an issue that will have to be addressed before the



1 second case, the case in the Supreme Court, could go
2 forward.

3 CHIEF JUDGE DIFIORE: Counsel, the - - -the
4 parties here haven't presented their argument - - - their
5 primary argument to be analyzed through the framework of
6 the Semtek Taylor line of cases but rather based on New
7 York principles of res judicata; is that correct?

8 MR. JANOWITZ: That is correct, although I - - -
9 I recognize in going through this and particularly
10 listening to Judge Garcia's questions I understand why the
11 Semtek analysis is - - - is of interest.

12 CHIEF JUDGE DIFIORE: Thank you, counsel.

13 MR. JANOWITZ: Thank you.

14 MR. KENDALL: First, with respect to this bad
15 faith issue, if you read the decision of Judge Forrest
16 which is in the record from the federal court, she could
17 not have been clearer that the claim that was asserted by
18 respondents in the federal court was absolutely without
19 evidentiary support and absolutely a false claim. I think
20 that is clearly obvious and in bad faith. But that isn't
21 actually the standard because the case law does not
22 establish that bad faith is required. The McMahan case
23 indicated damages including fees would be recoverable if an
24 agreement had included a covenant not to sue, never
25 mentioned bad faith as a requirement.



1 And there's also - - - in addition to citing that
2 case we cited the Indosuez International Finance case, 304
3 A.D.2d 429 (1st Dept. 2003) where damages including fees
4 were recovered for breach of a forum selection clause.
5 Again, no bad faith requirement. And on the impairment
6 point, there's no impairment because impairment requires
7 that Paramount, in this case, would be seeking to impair a
8 substantive determination made against it in the prior case
9 which we clearly are not doing. We are doing the opposite.
10 I'll also point out that they did not rely on the
11 impairment doctrine in their brief and under the
12 <indecipherable> case that we cite - - -

13 JUDGE RIVERA: So what - - - what's the statute
14 of limitations on this claim? Is it just a regular breach
15 of contract? What - - - what's the statute of limitations?
16 How long would you have had - - -

17 MR. KENDALL: Well, in - - -

18 JUDGE RIVERA: - - - to have brought this demand
19 for attorneys' fees?

20 MR. KENDALL: Six years under New York Law.

21 JUDGE WILSON: And when did it accrue?

22 MR. KENDALL: Pardon?

23 JUDGE WILSON: When did it accrue?

24 MR. KENDALL: It accrued upon the filing of the
25 initial complaint by the - - - by the respondents.



1 JUDGE FAHEY: Not the judgment - not the
2 judgment - - - not the underlying judgment?

3 MR. KENDALL: No, because the breach of the
4 covenant not to sue - - -

5 JUDGE FAHEY: I see.

6 MR. KENDALL: - - - occurred when they sued.

7 JUDGE GARCIA: Doesn't that undermine your
8 argument that it's not a compulsory counterclaim?

9 MR. KENDALL: No, to the contrary because the
10 case law is that a claim that accrues upon the filing of
11 process - - - for example abuse of process which was - - -

12 JUDGE FAHEY: I - - - I just can't - - - I just
13 don't understand how you would even know what your claim
14 was until the judgment was filed I guess. So - - -

15 MR. KENDALL: Well, it's a waste of time and
16 would have been in - - - in our view to bring a claim for
17 breach of the covenant not to sue when you haven't even won
18 the case yet. In that sense, although technically it's not
19 like malicious prosecution where you are required to wait
20 until you have a judgment, but it - - - the policy reasons
21 for waiting, the strategic reasons for waiting are
22 precisely the same.

23 JUDGE FAHEY: I see.

24 JUDGE RIVERA: Let me - - - let me ask you this.
25 If - - - if they had been successful in that lawsuit could



1 you then bring another action - - -

2 MR. KENDALL: If they had won?

3 JUDGE RIVERA: - - - on a covenant not to sue
4 seeking attorneys' fees?

5 MR. KENDALL: If they - - - if they had won?

6 JUDGE RIVERA: Yes.

7 MR. KENDALL: No. We could not have. But the
8 reason we couldn't have - - -

9 JUDGE RIVERA: Yes.

10 MR. KENDALL: - - - would have been because of
11 issue preclusion. Because we would have lost the question
12 of whether they were in breach of the contract, and if they
13 weren't in breach of the contract they didn't breach the
14 covenant not to sue provision. And so we wouldn't have a
15 case. This is why - - -

16 JUDGE RIVERA: Is it the exact same question
17 under both those parts of the provision?

18 MR. KENDALL: It - - - it is as a practical
19 matter if they - - - if they waived, as we proved in - - -
20 in the federal court - - -

21 JUDGE RIVERA: Sure.

22 MR. KENDALL: - - - that they had then they
23 necessarily breached the covenant not to sue. And that's
24 why we had issue preclusion in this case when we go back.
25 And as the Batavia Kill Watershed case that we cited in the



1 brief pointed out, it's because of the operation of issue
2 preclusion and summary judgment that this doesn't create a
3 burden, permissive counterclaims do not create a burden on
4 the New York State Courts. New York State Courts have
5 persisted very well without enormous amounts of permissive
6 counterclaim litigation in subsequent cases. And the
7 reason is - - - the only - - -

8 JUDGE RIVERA: Let's say we agree with you and -
9 - - and you can proceed. Are they able to raise questions
10 related to the merits about whether or not the American
11 rule applies and whether or not you actually can get the
12 attorneys' fees?

13 MR. KENDALL: I do think that they have the
14 ability to argue in the Supreme Court the question of
15 damages, the question as to whether the American rule
16 applies, although that is something that the Supreme Court
17 has - - - at least in - - - spoken to already. But, yes,
18 they'll - - - they'll be able to argue just about
19 everything other than liability.

20 JUDGE RIVERA: So they're not put in any worse
21 position by the fact that you didn't assert it as a
22 counterclaim?

23 MR. KENDALL: No, quite the contrary. No,
24 they're not put in any worse position at all.

25 CHIEF JUDGE DIFIORE: Thank you, counsel.



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MR. KENDALL: Thank you.
(Court is adjourned)



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C E R T I F I C A T I O N

I, Sara Winkeljohn, certify that the foregoing transcript of proceedings in the Court of Appeals of Paramount Pictures Corporation v. Allianz Risk Transfer AG, No. 16 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



Signature: _____

Agency Name: eScribers
Address of Agency: 352 Seventh Avenue
Suite 604
New York, NY 10001
Date: January 16, 2018

