

1-1-2010

Locked out: The Hidden Threat of Claim Preclusion for Tenants in Summary Process

Rosemary Smith

Follow this and additional works at: <https://dc.suffolk.edu/jtaa-suffolk>



Part of the [Litigation Commons](#)

Recommended Citation

15 Suffolk J. Trial & App. Advoc. 1 (2010)

This Article is brought to you for free and open access by Digital Collections @ Suffolk. It has been accepted for inclusion in Suffolk Journal of Trial and Appellate Advocacy by an authorized editor of Digital Collections @ Suffolk. For more information, please contact dct@suffolk.edu.

LOCKED OUT: THE HIDDEN THREAT OF CLAIM PRECLUSION FOR TENANTS IN SUMMARY PROCESS

*Rosemary Smith**

I. INTRODUCTION	2
II. BACKGROUND LEGAL PRINCIPLES: CLAIM PRECLUSION AND SUMMARY PROCESS COUNTERCLAIMS	3
A. Basic Preclusion Principles	4
B. Uniform Summary Process Rule 5	6
1. Status of Summary Process Counterclaims Prior to Adoption of Summary Process Rule 5	6
2. Adoption of Summary Process Rule 5	11
C. Reconciling Preclusion Principles with Summary Process Rule 5	13
III. THE CLAIM PRECLUSIVE EFFECT OF SUMMARY PROCESS PROCEEDINGS IN RECENT CASE LAW	15
A. Trial Court Dismissals Based on Preclusive Effect of Summary Process Proceedings	16
B. The <i>Doyle</i> Decision and Its Implications.....	18
C. Out-of-State Comparisons	21
D. Conclusions from the Case Law.....	26
IV. MISGUIDED RELIANCE ON RULE 5 IN THE LEGAL COMMUNITY	27
A. Legal Service Providers	28
B. Judges in Summary Process Cases	31
1. Motions to Amend Answers.....	31
2. Motions to Dismiss or Sever Counterclaims	34
V. PRACTICAL RECOMMENDATIONS FOR TENANT ATTORNEYS	36
A. Best Practices in Summary Process.....	37
1. Protecting Clients from the Effects of Claim Preclusion.....	37
2. Using the Precedent to a Tenant's Advantage.....	38
B. Policy Arguments Against Enforcement of Claim Preclusion in Subsequent Actions	39

* J.D., Harvard Law School. Ms. Smith served as a Student Attorney for the Harvard Legal Aid Bureau from the fall of 2007 through the spring of 2009. In this capacity, she represented low income tenants in summary process proceedings in the Boston Housing Court. Rosemary would like to thank David Grossman, Director of the Harvard Legal Aid Bureau, for his valuable assistance, as well as present and former Bureau members for their inspiring work on behalf of low income tenants in the Boston area.

VI. CONCLUSION	41
----------------------	----

I. INTRODUCTION

Throughout its history, Massachusetts has struggled to develop a satisfactory legal mechanism to remove a tenant from possession.¹ Summary process, the contemporary eviction procedure, continues to reflect the difficulty of reconciling the significant, competing interests at stake in housing cases. For the landlord, “real estate constitutes unique property and . . . time lost in regaining it from a party in illegal possession can represent an irreplaceable loss”² At the same time, a tenant has a “unique and fundamental need . . . for dwellings that are habitable and secure.”³ The summary process statute, supplemented by legal precedent and court procedural rules, attempts to strike a balance between these important interests in the eviction process.

In a sense, counterclaims are a classic example of how statute, precedent, and procedural rules work together to regulate summary process proceedings. Tenant counterclaims took on significance through a combination of statutory and decisional law, and have since been formalized in court procedural rules. Counterclaims are also an example, however, of how these diverse strains of legal influence can lead to a procedural regime that is at times arbitrary and even perverse. When the relevant legal standards are unclear or conflicting, courts are forced to fabricate procedural rules on an *ad hoc* basis, without the time or resources to fully assess the policy implications of their decisions. The result is a procedure that is at best unpredictable and at worst in conflict with the important interests that summary process is meant to protect.

This article brings attention to the problematic treatment of counterclaims in summary process law. It focuses on whether tenant counterclaims are compulsory—that is, whether they are barred by claim preclusion if not raised in summary process. A survey of relevant legal sources indicates that the answer is far from clear. Despite a broadly held assumption that tenant counterclaims are permissive, some courts have

¹ See Act Directing the Proceedings Against Forcible Entry and Detainer, ch. 8, 1784 Mass. Acts 19-24 (creating the first statutory dispossessory proceeding in 1784); see also 33A E. GEORGE DAHER & HARVEY CHOPP, LANDLORD AND TENANT LAW, § 16:1 (Mass. Prac. Series, 3d ed. 2009) (providing historical account of development of Massachusetts summary process statute).

² MASS. UNIF. SUMM. PROCESS R. 1 cmt.

³ *Id.*

taken the position that they are compulsory and therefore subject to claim preclusion. This confusion in the summary process law is likely to have a significant prejudicial effect on tenants, who cannot easily assess or protect against the threat they face from claim preclusion. Therefore, this paper recommends that tenant attorneys take two forms of remedial action. First, attorneys should adjust their practices in summary process cases to reflect the cautious assumption that tenant counterclaims are compulsory. Second, attorneys should develop and articulate the argument that treating tenant counterclaims as compulsory is inconsistent with the policy interests underlying summary process proceedings.

Part Two of this article reviews the ambiguous statutory language and procedural rules that have given rise to confusion concerning the proper treatment of tenant counterclaims. Parts Three and Four contrast recent Massachusetts court decisions, holding that tenant counterclaims are compulsory, with the broadly held assumption of summary process judges and lawyers that such counterclaims are permissive. Finally, Part Five identifies proper remedial procedures for tenant representatives to adopt. Although a comprehensive solution to this problematic area of law may need to come from the Massachusetts Legislature or Supreme Judicial Court, this article seeks to offer short term strategies for reducing the claim preclusion threat faced by tenants in summary process proceedings.

II. BACKGROUND LEGAL PRINCIPLES: CLAIM PRECLUSION AND SUMMARY PROCESS COUNTERCLAIMS

The legal issues at stake in this debate do not lend themselves to simple or categorical description. Both the common law doctrine of claim preclusion and the Massachusetts statutory summary process procedure have evolved over centuries, almost entirely independently of each other.⁴ They reflect attitudes toward civil litigation that cannot always be fully reconciled.⁵ This section will not attempt to present a definitive summary

⁴ See DAHER & CHOPP, *supra* note 1, at §16:1 (recounting public policy concerns behind revising self-help evictions and summary process procedure).

⁵ Claim preclusion is “based on the idea that the party to be precluded has had the incentive and opportunity to litigate the matter fully in the first lawsuit.” *Heacock v. Heacock*, 520 N.E.2d 151, 153, (Mass. 1988). Summary process, by contrast, is meant to secure the “just, speedy, and inexpensive determination of every summary process action.” MASS. UNIF. SUMM. PROCESS R. 1. This emphasis on speed may not always be consistent with full litigation of all issues. See, e.g., *Boston Hous. Auth. v. O’Hannisian*, No. 06-SP-031789, slip op. at 2-3 (Hous. Ct. Dep’t Order Apr. 6, 2007) (finding tenant’s retaliation, discrimination and personal injury claims would “distract the jury from the central issues to be decided”); *CMJ v. Stallworth*, No. 98-04095, slip op. at 1 (Hous. Ct. Dep’t Order Sept. 8, 1998) (granting plaintiff’s motion to strike counterclaim because it would distract from the central issue). But see *Lakewood Village, LLC v. Connors*,

of the law, nor indeed is such a project feasible in light of the key questions that courts have yet to answer. Rather, it highlights an important legal conflict and introduces a framework for thinking about how this conflict might be resolved.

A. Basic Preclusion Principles

The concept that a final judgment may have a preclusive effect on later actions, commonly referred to as *res judicata*, can be divided into two distinct doctrines: claim preclusion and issue preclusion.⁶ Claim preclusion prevents a party from bringing related claims in multiple lawsuits by providing that a “valid, final judgment” is “conclusive on the parties . . . and bars further litigation of all matters that were or should have been adjudicated in the action.”⁷ Issue preclusion prevents a party from litigating the same issue in multiple lawsuits.⁸ By foreclosing duplicative litigation of claims and issues, these two doctrines jointly “relieve parties of the cost and vexation of multiple lawsuits, conserve judicial resources, and, by preventing inconsistent decisions, encourage reliance on adjudication.”⁹ Claim and issue preclusion are “based on the idea that the party to be precluded has had the incentive and opportunity to litigate the matter fully in the first lawsuit.”¹⁰

In general, issue preclusion applies with full force to summary process proceedings. Thus, for example, in *Possehl v. Ossino*,¹¹ issue preclusion applied to bar a tenant from bringing a negligence claim against his landlord.¹² The tenant had raised the identical claim in an earlier summary process proceeding, which had ended in an agreement for

No. 06-SP-031789, slip op. at 1 (Hous. Ct. Dep’t Order March 23, 2005) (allowing tenant claims despite recognizing “landlord’s right to expeditious determination of the summary process case”).

⁶ See *Bagley v. Moxley*, 555 N.E.2d 229, 231 (Mass. 1990) (“The phrase ‘res judicata’ encompasses both the doctrine of ‘claim preclusion’ and the doctrine of ‘issue preclusion.’” (citing *Heacock*, 520 N.E.2d at 152 n.2).

⁷ *Heacock*, 520 N.E.2d at 152-53.

⁸ See *Cousineau v. Laramee*, 448 N.E.2d 756, 759 n.4 (Mass. 1983) (quoting RESTATEMENT (SECOND) OF JUDGMENTS § 27 (1982)) (“[W]hen an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties whether on the same or a different claim.”).

⁹ *Bagley*, 555 N.E.2d at 231 (quoting *Allen v. McCurry*, 449 U.S. 90, 94 (1980)).

¹⁰ *Heacock*, 520 N.E.2d at 153 (quoting *Foster v. Evans*, 429 N.E.2d 995, 1000 n.10 (Mass. 1981)).

¹¹ 547 N.E.2d 59 (Mass. App. Ct. 1989).

¹² *Id.* at 60 (barring negligence claim “the tenant cranked up” after eviction settlement).

judgment in favor of the landlord.¹³ The court affirmed dismissal of the tenant's suit, noting that "parties may not relitigate a claim which has been submitted to the court for decision and which has become the subject of a final and unappealed judgment in that forum."¹⁴ Similarly, issue preclusion has also applied to bar a landlord from reasserting allegations actually litigated in a prior summary process proceeding.¹⁵

The applicability of claim preclusion to summary process proceedings is a more difficult question. The Massachusetts statute governing summary process does not directly address the applicability of claim preclusion in most circumstances.¹⁶ In *Bui v. Ma*,¹⁷ however, the court squarely applied claim preclusion to the claims of a *landlord* in summary process.¹⁸ *Bui* involved a second summary process action brought against the same tenant by a successor landlord.¹⁹ Applying basic claim preclusion principles, the court concluded that the successor landlord was barred from raising certain claims to possession that could have been raised by her predecessor in interest in the first summary process action.²⁰ As the court explained: "[T]he guiding principle is that [the current landlord] is precluded from litigating not only those claims that were actually decided in the [prior summary process action] but also those that could have been brought in that action."²¹

¹³ *Id.* (stating history of case).

¹⁴ *Id.*

¹⁵ See *Misujo Realty Trust v. 5215 Dev. Inc.*, 2002 Mass. App. Div. 136, 137 (App. Div. 2002) (citing *Wright Mach. Corp. v. Seaman-Andwall Corp.*, 307 N.E.2d 826, 829-30 (Mass. 1974)) ("Misujo failed to [appeal the previous judgment], and must thus be deemed to have waived any objection to that decision and any right to bring a subsequent action raising the same issue.").

¹⁶ See MASS. GEN. LAWS ANN. ch. 239, §§ 1-13 (2008). Section 7 is the only portion of the statute that directly addresses the issue of claim preclusion. It states that judgment in a summary process proceeding "shall not be a bar to any action thereafter brought by either party to recover the land or tenements in question, or to recover damages for any trespass thereon." *Id.* at § 7. Though this provision could be read to apply to all claims, it has been narrowly interpreted to mean only that subsequent actions to settle title in the land are not barred by claim preclusion. See *Edwards v. Columbia Amusement Co.*, 102 N.E. 268, 269 (Mass. 1913) (finding previous version of MASS. GEN. LAWS ch. 239 § 7 only prevented preclusion if tenant sought "to settle the title").

¹⁷ 818 N.E.2d 572 (Mass. App. Ct. 2004).

¹⁸ See *id.* at 578. In its discretion, a court may nevertheless permit a landlord to split his summary process claim for possession from other tenancy-related claims. See *Qureshi v. In Fiske Capital Mgmt. Co.*, 796 N.E.2d 459, 463 n.5 (Mass. App. Ct. 2003) (holding landlord could bring its summary process action in separate forum from previous, tenant initiated suit), *aff'd* 2002 Mass. App. Div. 117 (App. Div. 2002). Under such circumstances, the summary process proceeding would not have a claim preclusive effect on the related litigation. *Id.*

¹⁹ *Bui*, 818 N.E.2d at 576 (recounting subsequent eviction actions based on rent dispute).

²⁰ *Id.* at 578-80 (holding claim preclusion barred landlord's claims).

²¹ *Id.* at 579.

Thus, the outstanding question, explored throughout this article, is whether claim preclusion applies to the counterclaims of a *tenant* in summary process. In general, claim preclusion principles do not apply to defendants' counterclaims unless a statute or rule of court makes those counterclaims "compulsory."²² The Massachusetts procedural rules contain two relevant provisions: one from the rules broadly governing civil actions and one from the rules more narrowly governing summary process proceedings.²³ Massachusetts Rule of Civil Procedure 13 ("Rule 13"), with certain exceptions not relevant to our analysis, makes counterclaims compulsory if they "arise[] out of the transaction or occurrence that is the subject matter of the opposing party's claim."²⁴ By contrast, Uniform Summary Process Rule 5 ("Rule 5") specifically provides that summary process counterclaims "shall *not* be considered compulsory."²⁵ The proper reconciliation of these two provisions cannot be determined in an informational vacuum. Rather, one must first look to the history and context of Rule 5 in order to understand its intended scope and the manner in which courts will likely interpret it.

B. Uniform Summary Process Rule 5

1. Status of Summary Process Counterclaims Prior to Adoption of Summary Process Rule 5

As reviewed in the previous section, claim preclusion only applies to counterclaims that are treated as compulsory under the applicable procedural rules.²⁶ Unfortunately, Massachusetts policymakers have historically given little official attention to the proper treatment of summary process counterclaims. No statute addresses this issue.²⁷ Furthermore, prior to 1980, there were no uniform court procedural rules

²² See *Mitchell v. Stein*, 2002 Mass. App. Div. 40, 42 (App. Div. 2002) (citing RESTATEMENT (SECOND) OF JUDGMENTS § 22 cmt. e (1982)) (explaining counterclaim preclusion doctrine outlined in MASS. R. CIV. P. 13(a)). The Restatement (Second) of Judgments suggests the rationale for this exception is that a "defendant should not be required to assert his claim in the forum or the proceeding chosen by the plaintiff, but should be allowed to bring suit at a time and place of his own selection. See RESTATEMENT (SECOND) OF JUDGMENTS § 22 cmt. a (1982).

²³ See MASS. R. CIV. P. 13; MASS. UNIF. SUMM. PROCESS R. 5.

²⁴ MASS. R. CIV. P. 13(a).

²⁵ MASS. UNIF. SUMM. PROCESS R. 5 (emphasis added).

²⁶ See *supra* notes 22 and accompanying text (discussing limited application of claim preclusion).

²⁷ See *supra* note 16 (providing minimal statutory basis for counterclaim preclusion).

governing summary process proceedings.²⁸ Rule 13, which makes counterclaims compulsory if they arise out of the same “transaction or occurrence,” did not necessarily apply to summary process proceedings.²⁹ Rather, summary process was governed by the cryptic requirement that it “follow the course of the common law, as near to [the Rules of Civil Procedure] as may be”³⁰

Available pre-1980 case law also provides little insight respecting the historical treatment of summary process counterclaims. Although several decisions held that summary process proceedings had “*res judicata*” effect against the tenant, these cases appear to have involved re-litigation of issues previously litigated in summary process and did not address the extent to which counterclaims would be treated as compulsory.³¹ Local procedural rules for summary process proceedings, which existed in both Hampden County and the City of Boston prior to the state-wide adoption of uniform rules, are also inconclusive.³² In both jurisdictions, the Massachusetts Rules of Civil Procedure were applicable unless the local summary process rules specified otherwise.³³ Therefore, absent clear contradiction, Rule 13’s compulsory counterclaim standard would apply.³⁴ In Boston, the summary process rules *did* appear to reject Rule 13, providing “[c]ounterclaims shall not be compulsory.”³⁵ In

²⁸ See *infra* notes 57-58 and accompanying text (describing creation of uniform summary process rules).

²⁹ MASS. R. CIV. P. 81(a) (limiting applicability of Mass. R. Civ. P. in various proceedings, including summary process).

³⁰ *Id.*

³¹ See, e.g., *Goode v. Esterman*, 342 Mass. 527, 528 (1961) (noting “*res judicata*” established end to tenancy); *Gordon v. Sales*, 147 N.E.2d 803, 804 (Mass. 1958) (declining to consider adequacy of notice based on *res judicata* effect of prior summary process proceeding); *Edwards v. Columbia Amusement Co.*, 102 N.E. 268, 269 (Mass. 1913) (holding lack of notice in prior dispossessory proceeding “became *res judicata* between these parties”).

³² Compare BOSTON HOUS. CT. R. IN SUMM. PROCESS ACTIONS 3 (1979) (repealed 1980) (rejecting claim preclusion), with HAMPDEN COUNTY R. GOVERNING SUMM. PROCESS ACTIONS 6 (1979) (repealed 1980) (implicitly allowing claim preclusion by failing to contradict Rule 13). The Uniform Summary Process Rules, which replaced the local rules in 1980, established uniform rules for summary process proceedings throughout the state. See *infra* notes 57-58 and accompanying text.

³³ See BOSTON HOUS. CT. R. IN SUMM. PROCESS ACTIONS 1 (1979) (repealed 1980) (“Where a procedure is not specifically prescribed by these rules, the procedure to be followed, unless inconsistent with or proscribed by these rules, shall be the applicable procedure set out in the Massachusetts Rules of Civil Procedure”); HAMPDEN COUNTY R. GOVERNING SUMM. PROCESS ACTIONS 1 (1979) (repealed 1980) (“Where a procedure is not specifically prescribed by these Rules, the procedure to be followed, unless specified otherwise by these Rules, shall be as near as possible to the applicable procedure set out in the Massachusetts Rules of Civil Procedure”).

³⁴ See *supra* note 33; see also MASS. R. CIV. P. 13(a) (noting claims that arise out of the same transaction or occurrence are compulsory counterclaims).

³⁵ BOSTON HOUS. CT. R. IN SUMM. PROCESS ACTIONS 3(c) (1979) (repealed 1980).

Hampden County, however, the summary process rules did not contradict Rule 13, merely allowing for assertion of any counterclaim that is “within the jurisdiction of the Court in Summary Process Cases.”³⁶

One contemporaneous source suggests that counterclaims were not treated as compulsory before 1980.³⁷ In a 1980 letter to *Massachusetts Lawyer’s Weekly*, David Kerman, a tenant attorney at the time and now a housing court judge, stated it would be “consistent with both prevailing practice and with statutory and common law requirements” to treat tenants’ counterclaims in summary process as permissive, rather than compulsory.³⁸ This assertion indicates that prior to 1980, summary process counterclaims were permissive and, therefore, not subject to claim preclusion.³⁹ However, there are at least two reasons to be wary of drawing grand inferences from these comments. First, as noted, Judge Kerman represented tenants at the time he made these comments, and therefore may have been taking an aggressive position on the law that was more favorable to his clients.⁴⁰ Second, Judge Kerman’s discussion of the permissive nature of counterclaims focused on the fact that tenants should be allowed to bring counterclaims, rather than on the corollary fact that claim preclusion should not apply.⁴¹ Thus, while worthy of consideration, Judge Kerman’s argument cannot be treated as definitive.

The dearth of early precedent concerning treatment of tenant counterclaims may be at least partially attributable to traditional common law principles limiting tenants’ legal recourse in summary process

Although this rule, along with all of the local summary process rules, was replaced by the Uniform Summary Process Rules in 1980, its language is closely approximated in the current MASS. UNIF. SUMM. PROCESS R. 5, which states: “Counterclaims shall not be considered compulsory” The current rules are discussed in detail below. *See infra* notes 57-70 and accompanying text.

³⁶ HAMPDEN COUNTY R. GOVERNING SUMM. PROCESS ACTIONS 6 (1979) (repealed 1980).

³⁷ *See* David D. Kerman, Letter to the Editor, 8 MASS. LAW. WKLY., March 31, 1980, at 684 (providing “neutral approach” to proposed summary process rules). In this 1980 letter to *Massachusetts Lawyer’s Weekly*, David Kerman, who was a tenants’ attorney at the time, argued that, with minor modifications, the Massachusetts Rules of Civil Procedure should govern summary process actions. *Id.* David Kerman is now First Justice of the Northeast Housing Court. *See* <http://www.mass.gov/courts/courtsandjudges/courts/northeasthousingjl.html> (last accessed Jan. 7, 2010).

³⁸ *See* Kerman, *supra* note 37, at 685 (“[B]ecause the coupling of a money damage claim . . . with a claim for possession of land often frustrates settlement, no counterclaim . . . is deemed compulsory in an action for summary process.”).

³⁹ *See id.* at 685 (asserting summary process counterclaims were permissive in practice prior to 1980).

⁴⁰ *See id.* at 684 (noting that the author is “certainly a lawyer who represents tenants”).

⁴¹ *See id.* at 685 (stressing counterclaims should be “interposable” in summary process).

proceedings.⁴² Traditionally, the doctrine of *caveat emptor* established that tenants did not have any legal claim for damages against their landlords based on the conditions of the premises alone.⁴³ Furthermore, because the obligation to pay rent was considered independent of any covenants of the landlord, even successful counterclaims would generally not be valid defenses against a landlord's claim of possession for nonpayment of rent.⁴⁴ Thus, although the practice was not unheard of, tenants rarely had an incentive to raise counterclaims in summary process proceedings.⁴⁵

A combination of judicial and legislative action beginning in the late 1960s and developing throughout the 1970s dramatically reversed this constrained judicial approach to tenant counterclaims.⁴⁶ In 1965, the Massachusetts legislature added a new section to the summary process statute. Challenging the traditional rule of independent covenants, Massachusetts General Laws Chapter 239, Section 8A permitted tenants to withhold rent if the rented premises were "in violation of the standards of fitness for human habitation established under the state sanitary code"⁴⁷ A tenant withholding rent in accordance with the relatively technical

⁴² See Mary Ann Glendon, *The Transformation of American Landlord-Tenant Law*, 23 B.C. L. REV. 503, 509-17 (1982) (describing limited rights of tenants under traditional American landlord-tenant law); see also Michael Madison, *The Real Properties of Contract Law*, 82 B.U. L. REV. 405, 410-13 (2002) (framing traditional landlord-tenant law as a "property approach").

⁴³ See *Royce v. Guggenheim*, 106 Mass. 201, 202 (1870) ("It is now well settled, both here and in England, that in a lease of a building for a dwelling-house or store no covenant is implied that it should be fit for occupation."), *overruled in part by* *Boston Hous. Auth. v. Hemingway*, 293 N.E.2d 831 (Mass. 1973).

⁴⁴ *Royce*, 106 Mass. at 202-03 (stating old common law rule barring tenant from refusing to pay rent due to habitability issues). The *Royce* court limited the tenant's remedy to an "action for damages." *Id.*

⁴⁵ See Glendon, *supra* note 42, at 512 (portraying summary process under traditional rules as "primarily" a tool to benefit landlords). But see *Ferguson v. Jackson*, 62 N.E. 965, 965 (Mass. 1902) (recognizing tenant right to assert claim to right of renewal in summary process). There is some support for the view that, prior to explicit statutory recognition of the practice in 1975, tenants had no legal authority to bring counterclaims in summary process. See *Fafard v. Lincoln Pharmacy of Milford, Inc.*, 789 N.E.2d 147, 149 (Mass. 2003). However, as one housing court judge and scholar has noted, "in a residential context, affirmative defenses and counterclaims outside the purview of [the statute] are often raised in summary process cases." David D. Kerman, *Bench Memorandum for Residential Summary Process Cases in 2 RESIDENTIAL AND COMMERCIAL LANDLORD-TENANT PRACTICE IN MASSACHUSETTS*, App. 2, at § 37 (Catherine F. Downing ed., 2001 & Supps. 2004, 2006); see also *Pafumi v. Halgas*, No. 06-SP-0844 (Hous. Ct. Dep't Order Mar. 24, 2006) (allowing tenant to bring counterclaim in fault eviction, even though practice not recognized by statute).

⁴⁶ See generally Joel Kurtzberg & Jamie Henikoff, *Freeing the Parties From the Law: Designing an Interest and Rights Focused Model of Landlord/Tenant Mediation*, 1997 J. DISP. RESOL. 53, 65-70 (1997) (describing changes in critique of role of mediation in Massachusetts summary process practice).

⁴⁷ Act Providing That Violations Of Standards Of Fitness For Human Habitation Shall Constitute A Defense In Actions of Summary Process To Recover Possession Of Rented Or

requirements of the statute could use this as a full defense in any summary process action for nonpayment of rent.⁴⁸ Building on this legislative action, the Supreme Judicial Court of Massachusetts, in *Boston Housing Authority v. Hemingway*,⁴⁹ first recognized the existence of an implied warranty of habitability in all residential leases.⁵⁰ At the time *Hemingway* was decided, section 8A's technical requirements for withholding rent still limited a tenant's ability to raise the implied warranty as a defense in summary process.⁵¹ Shortly thereafter, however, the legislature loosened the requirements of section 8A by removing the tenant's obligations to give prior written notice of rent withholding and to prove any code violations by inspection.⁵² These changes potentially made claims for breach of the implied warranty of habitability a viable defense for many more tenants.⁵³

Throughout the 1970s, both the courts and the Massachusetts Legislature continued to expand the range of counterclaims available to tenants as defenses in summary process.⁵⁴ The Massachusetts Appeals

Leased Premises, ch. 888, 1965 Mass. Acts 731 (codified as amended at MASS. GEN. LAWS ANN. ch. 239, § 8A (2004)).

⁴⁸ See *id.* The statute required prior notification in writing to the landlord of the tenant's intention to withhold rent. *Id.* It was later expanded to include evictions without fault. See Act Further Regulating The Recovery Of Possession By Summary Process Of Rented Or Leased Premises In Cases Of Violation Of Standards Of Fitness For Human Habitation, ch. 420, 1967 Mass. Acts 315 (codified as amended at ch. 239, § 8A).

⁴⁹ 293 N.E.2d 831 (Mass. 1973).

⁵⁰ *Id.* at 842-43 (recognizing implied warranty of habitability in residential leases); see also Glendon, *supra* note 42, at 528 (describing catalytic effect of this legislation on judicial development of implied warranty of habitability).

⁵¹ See *Hemingway*, 293 N.E.2d at 844-45 (explaining limitations on using breach of warranty of habitability as a complete defense to eviction).

⁵² See Act Clarifying The Rent Withholding Laws, ch. 963, 1977 Mass. Acts 1400 (codified as amended at ch. 239, § 8A) (loosening requirements for raising implied warranty of habitability defense to eviction). Before this time, tenants were required to provide prior written notice to their landlords before withholding rent and had to have an inspection of the unit to prove any code violation. See Ch. 888, 1965 Mass. Acts at 731.

⁵³ See Roger A. Cunningham, *The New Implied and Statutory Warranties of Habitability in Residential Leases: From Contract to Status*, 16 URB. L. ANNUAL 3, 42-43 (1979) (concluding because of amendments, "tenants should more often be successful in defeating summary eviction suits").

⁵⁴ See Act Further Regulating Rent Withholding And Rent Receivership Procedures, ch. 467, § 3, 1975 Mass. Acts 483 (codified as amended at ch. 239, § 8A (2004)) (tenant has right to use "any counterclaim that said person may bring in good faith against the landlord, including any damages owed because of breach of warranty or a violation of any other law" as a defense for nonpayment in summary process). See generally *Berman & Sons, Inc. v. Jefferson*, 396 N.E.2d 981, 983 (Mass. 1979) (holding lack of fault no defense for landlord's breach of warranty of habitability). The court based its decision in part on the "social changes in landlord-tenant relations" embodied in *Boston Housing Authority v. Hemingway*, 293 N.E.2d 831, 844-45 (Mass. 1973). *Id.* Today, a tenant facing eviction without fault or for nonpayment of rent can raise, as a defense in summary process, "any claim against the plaintiff relating to or arising out of such

Court has accurately captured the effect of these parallel judicial and legislative efforts, describing it as a “metamorphosis of summary process actions,” from specialized adjudications of the right of possession into “an almost complete civil proceeding.”⁵⁵ In the wake of this sea change to the underlying structure and purpose of summary process, a special committee of the Massachusetts Supreme Judicial Court took up the task of developing uniform procedural rules to govern summary process proceedings.⁵⁶

2. Adoption of Summary Process Rule 5

In January 1980, the Supreme Judicial Court Joint Committee on Uniform Summary Process Rules published proposed rules to govern all summary process proceedings in Massachusetts.⁵⁷ After allowing six months for public comment, the Committee adopted the final rules in July of 1980, and they became effective on September 1st of the same year.⁵⁸ A version of Summary Process Rule 5, entitled “COUNTERCLAIMS,” existed in both the original and final rules.⁵⁹ The most significant amendment to the rule concerned the scope of permissible counterclaims. The original proposed rule limited counterclaims to those arising out of “transactions and occurrences directly related to the landlord-tenant relationship.”⁶⁰ However, the final rule allowed litigants to raise any counterclaims permitted under section 8A of the summary process statute, which is arguably broader.⁶¹ Despite these differences, the crucial language is identical in both the original and final versions of Rule 5, and

property, rental, tenancy, or occupancy for breach of warranty, for a breach of any material provision of the rental agreement, or for a violation of any other law.” Ch. 239, § 8A (2004).

⁵⁵ *Shea v. Neponset River Marine & Sportfishing, Inc.*, 437 N.E.2d 250, 254 (Mass. App. Ct. 1982) (observing legislative efforts granted “plaintiffs the right to recover rent and use and occupation damages and defendants the right to counterclaim”).

⁵⁶ See *infra* note 57-58 and accompanying text.

⁵⁷ See *Proposed New Summary Process Rules*, 8 MASS. LAW. WKLY., Jan. 21, 1980, at 437-39. The members of the committee were: Hampden Housing Court Judge Edward C. Peck, Jr.; Supreme Judicial Court Deputy Administrative Assistant Robert S. Bloom; Boston Municipal Court Civil Clerk Michael J. Coleman; District Court Administrative Attorney John M. Connors; and Superior Court Assistant Clerk (Civil) Christine M. Mackay. See *Uniform Eviction Rules Proposed*, 8 MASS. LAW. WKLY., Jan. 21, 1980, at 421.

⁵⁸ *New Summary Process Rules Set*, 8 MASS. LAW. WKLY., July 21, 1980, at 1035.

⁵⁹ See *Proposed New Summary Process Rules*, *supra* note 57; *New Summary Process Rules Set*, *supra* note 58.

⁶⁰ *Proposed New Summary Process Rules*, *supra* note 57.

⁶¹ Section 8A permits a tenant to raise “any claim against the plaintiff relating to or arising out of such property, rental, tenancy, or occupancy” Ch. 239, § 8A (2004). For further discussion of this provision, see *supra* notes 47-54 and accompanying text.

remains the same today: “Counterclaims shall not be considered compulsory; that is, they shall not be considered waived for the purpose of a separate civil action or actions if not asserted in a summary process action.”⁶² Although possible exceptions are considered below, the clear import of this provision is that summary process counterclaims are generally permissive.

The Uniform Summary Process Rules also contain a brief commentary in conjunction with each rule.⁶³ The commentary accompanying Rule 5 does not speak directly to the issue of claim preclusion, rather it asserts that 1) counterclaims are permissible, but 2) they are also severable, under most circumstances, pursuant to the court’s discretion:

This rule recognizes the statutory right of summary process defendants to assert counterclaims Because counterclaims are not compulsory, the court retains discretion to sever a counterclaim which cannot appropriately be heard as part of the summary process action. It would, however, appear to be contrary to the law to sever a counterclaim which is being relied upon as a defense under G.L. c. 239, § 8A.⁶⁴

These comments can best be understood in light of the dramatic expansion to summary process that occurred in the 1960s and 70s.⁶⁵ It appears that, in Rule 5, the Committee attempted to accommodate these new legal rights of tenants, while still preserving to some degree the traditional role of summary process proceedings as efficient, streamlined suits for possession.⁶⁶

⁶² MASS. UNIF. SUMM. PROCESS R. 5. The full text of the Rule provides as follows:

Counterclaims shall be permitted in accordance with the provisions of G.L. c. 239, § 8A. Counterclaims shall be set forth in the defendant’s answer and shall be expressly designated as counterclaims. The right to counterclaim shall be deemed to be waived as to the pending action if such a claim is not filed with the answer pursuant to Rule 3, unless the court shall otherwise order on motion for cause shown. Counterclaims shall not be considered compulsory; that is, they shall not be considered waived for the purpose of a separate civil action or actions if not asserted in a summary process action. No responsive pleading to a counterclaim is necessary.

Id.

⁶³ See generally MASS. UNIF. SUMM. PROCESS R. 1 – 13 cmt.

⁶⁴ MASS. UNIF. SUMM. PROCESS R. 5 cmt.

⁶⁵ See *supra* notes 46-55 and accompanying text (recounting judicial and legislative overhaul of summary process).

⁶⁶ See MASS. UNIF. SUMM. PROCESS R. 1 cmt. (noting contrasting goals of protecting

In sum, the text of Rule 5 clearly demonstrates that summary process counterclaims are meant to be permissive, at least as a default principle.⁶⁷ This treatment is also likely consistent with common law practice prior to adoption of the Uniform Summary Process Rules.⁶⁸ Therefore, applying basic preclusion principles, it seems that claim preclusion should not apply to such permissive counterclaims.⁶⁹ As Rule 5 itself states, counterclaims “shall not be considered waived for the purpose of a separate civil action or actions if not asserted in a summary process action.”⁷⁰ We now complete our review of relevant legal principles by considering whether there is any reason to qualify Rule 5’s seemingly clear and comprehensive protection for summary process counterclaims.

C. Reconciling Preclusion Principles with Summary Process Rule 5

As we have seen, there are two conflicting strands in Massachusetts procedural practice. On the one hand, under Massachusetts Rule of Civil Procedure 13, counterclaims are compulsory, and therefore subject to claim preclusion, if they “arise[] out of the transaction or occurrence that is the subject matter of the opposing party’s claim.”⁷¹ On the other hand, under Uniform Summary Process Rule 5, all counterclaims in summary process “shall not be considered compulsory.”⁷² There is no

tenants’ rights while streamlining eviction procedure). The commentary to MASS. UNIF. SUMM. PROCESS R. 1 acknowledges the influence of these concerns over the rules development process:

These rules seek to reconcile two competing principles. The first is that time is of the essence in eviction cases. This is based on the notion that real estate constitutes unique property and that because it generates income, time lost in regaining it from a party in illegal possession can represent an irreplaceable loss to the owner. The Legislature clearly recognized these factors in creating a special chapter of the General Laws establishing a “summary” procedure. The other principle involved is the unique and fundamental need of tenants for dwellings that are habitable and secure. Recognition of this need has resulted in extensive changes through case law in the legal relationship between tenants and landlords and a host of legislative enactments providing tenants with new rights and remedies. These changes have made the legality of possession an often difficult and complex judicial question.

Id.

⁶⁷ See *supra* notes 60-62 and accompanying text (describing textual support for the conclusion that summary process counterclaims are permissive).

⁶⁸ See *supra* notes 37-41 and accompanying text (discussing evidence that counterclaims were treated as permissive in practice).

⁶⁹ See *Mitchell v. Stein*, 2002 Mass. App. Div. 40, 42 (App. Div. 2002) (explaining that claim preclusion only applies to compulsory counterclaims).

⁷⁰ MASS. UNIF. SUMM. PROCESS R. 5.

⁷¹ MASS. R. CIV. P. 13(a).

⁷² MASS. UNIF. SUMM. PROCESS R. 5.

doubt that “a rule of court has the force of law, and is binding upon a judge.”⁷³ The important question yet to be resolved, however, is to what extent, if any, judges should construe Rule 13 as limiting the effect of Rule 5.

Uniform Summary Process Rule 1 provides general guidelines for courts and litigants in attempting to resolve conflicts between summary process rules and more generally applicable rules of civil procedure.⁷⁴ First, the Rule states that “[p]rocedures not prescribed by [the Uniform Summary Process Rules] shall be governed by the Massachusetts Rules of Civil Procedure insofar as the latter are not inconsistent with these rules, with applicable statutory law or with the jurisdiction of the particular court in which they would be applied.”⁷⁵ Second, as an interpretive matter, both the summary process rules and applicable rules of civil procedure “shall be construed and applied to secure the just, speedy, and inexpensive determination of every summary process action.”⁷⁶

Applying the above principles, one plausible interpretation is that Rule 5 is facially inconsistent with Rule 13, and therefore Rule 5 alone governs summary process counterclaims. On this view, *all* counterclaims in summary process are permissive and should be protected from the effects of claim preclusion. Other interpretations, however, are also possible. Based on the explicit sanction to consider speed and economy when interpreting the rules, as well as the absence of any legislative guidance on the matter, one could argue Rule 5 should be more narrowly construed. For example, one could argue that Rule 5 must be read as fully constrained by Rule 13. Thus, counterclaims would only be permissive under Rule 5 if they did not “arise” out of the same “transaction or occurrence” as the landlord’s claim for possession, under Rule 13.⁷⁷ Alternatively, one could argue that Rule 5 only applies if the tenant is willing to forgo all counterclaims in summary process. Raising *any* counterclaims, however, would trigger Rule 13 in full force, and would make *all* of the tenant’s counterclaims compulsory that arise out of the

⁷³ Pratt v. Pratt, 157 Mass. 503, 505 (Mass. 1892) (citing Baker v. Blood, 128 Mass. 543, 545 (Mass. 1880)) (recognizing binding nature of court rules governing divorce proceedings).

⁷⁴ MASS. UNIF. SUMM. PROCESS R. 1 (outlining scope and applicability of Uniform Summary Process Rules).

⁷⁵ *Id.*

⁷⁶ *Id.* The commentary to Rule 1 further clarifies that “[t]he need . . . is for rules that will ensure expeditious proceedings and yet comprehend all potential substantive and procedural complexities.” MASS. UNIF. SUMM. PROCESS R. 1 cmt.

⁷⁷ See MASS. R. CIV. P. 13(a) (“A pleading shall state as a counterclaim any claim for relief . . . if it arises out of the same transaction or occurrence that is the subject matter of the opposing party’s claim . . .”).

same transaction.

Given Rule 5's explicit classification of counterclaims as permissive, the textual argument that it entirely supersedes Rule 13 in the context of summary process proceedings is quite persuasive. However, there does not appear to be any definitive evidence regarding the intent of the rules committee, much less that of the Legislature, or of common law practice. Thus, the judiciary is not clearly bound to any particular interpretation of Rule 5. Taking full advantage of this discretion, courts have offered a range of positions on the claim preclusive effect of summary process actions on tenants' counterclaims.⁷⁸

III. THE CLAIM PRECLUSIVE EFFECT OF SUMMARY PROCESS PROCEEDINGS IN RECENT CASE LAW

As the above discussion illustrates, a facial review of the Uniform Summary Process Rules could easily lead one to conclude that Rule 5 fully protects tenants in summary process from the effects of claim preclusion.⁷⁹ Some support for this view can also be gathered from the Massachusetts Appeals Court's decision in *Turner v. Community Homeowner's Ass'n, Inc.*⁸⁰ The court in *Turner* rejected a landlord's contention that its tenant should be barred from bringing an affirmative suit because her claim could have been raised in an earlier summary process action.⁸¹ Although the court emphasized the consent of the parties, it also noted, in *dicta*, that it could not "find anything in our procedural rules to support [the landlord's] argument of claim preclusion."⁸² The court then cited Rule 5, as well as MASS. R. CIV. P. 81(a)(1)(7), which "exempts summary process actions from the Massachusetts Rules of Civil Procedure."⁸³ These comments could plausibly be understood as a blanket rejection of claim preclusion principles in the summary process context.⁸⁴

⁷⁸ See *Turner v. Cmty. Homeowner's Ass'n, Inc.*, 816 N.E. 2d 537, 544 n. 12 (Mass. App. Ct. 2004) (suggesting claim preclusion would not apply under any circumstances to summary process); *Doyle v. Baltaks*, 2007 Mass. App. Div. 43, 44-46 (App. Div. 2007) (holding claim preclusion would apply where tenant had raised counterclaims in summary process); *Murray v. Zullo*, 20 Mass. L. Rptr. 293, 293-95 (Super. Ct. 2005) (applying claim preclusion even though tenant raised no counterclaims in summary process).

⁷⁹ See *supra* notes 59-70 and accompanying text (summarizing the content of Rule 5).

⁸⁰ 816 N.E. 2d 537 (Mass. App. Ct. 2004).

⁸¹ *Id.* at 544 (rejecting application of claim preclusion to counterclaims not raised in summary process proceedings).

⁸² *Id.* at 544 n. 12.

⁸³ *Id.*

⁸⁴ Two earlier decisions from Massachusetts appellate courts provide additional, circumstantial support for this position. See *Qureshi v. Fiske Capital Mgmt. Co.*, 796 N.E.2d

Despite this appearance of agreement, the conclusion that claim preclusion does not apply to summary process proceedings is far from settled law.⁸⁵ Indeed, recent decisions by Massachusetts courts strongly indicate that the premise is invalid.⁸⁶ In at least two cases after *Turner*, trial courts have applied the doctrine of claim preclusion to bar affirmative suits brought by tenants after the conclusion of a summary process action against them.⁸⁷ One court in the Massachusetts Appellate Division has also provided at least qualified support for this practice.⁸⁸ Finally, courts in states with summary process procedural rules similar to those of Massachusetts have held that claim preclusion still applies.⁸⁹ These developments call for a reassessment of the risks facing tenants in summary process proceedings.

A. Trial Court Dismissals Based on Preclusive Effect of Summary Process Proceedings

Two 2005 trial court decisions demonstrate the judicial willingness to dismiss affirmative suits by tenants based on the preclusive effect of a summary process action. In *Young v. Estate of Lapolito*,⁹⁰ a former tenant sought to recover damages from his landlord for breach of contract based on a deed allegedly transferring him title to the property.⁹¹ An earlier summary process action between the parties had been settled by an agreement for judgment, in which the tenant agreed to vacate the premises and the landlord waived the rent that was due.⁹² Although the tenant had

459, 463 n.5 (Mass. App. Ct. 2003) (approving lower court's decision to adjudicate tenant's claims in separate forum from summary process action); Univ. of Lowell Research Found. v. Classic Elite Yarns, Inc., 1998 Mass. App. Div. 200, 202-03 (App. Div. 1998) (noting tenant could bring counterclaims in later action because summary process counterclaims are permissive).

⁸⁵ Compare *Turner*, 816 N.E. 2d at 544 n. 12 (suggesting claim preclusion would not apply), with *Doyle v. Baltaks* 2007 Mass. App. Div. 43, 44-46 (App. Div. 2007) (holding claim preclusion would apply without reference to *Turner*).

⁸⁶ See *Young v. Estate of Lapolito*, 20 Mass. L. Rptr. 154, 154 (Super. Ct. 2005) (applying claim preclusion in summary process); *Murray v. Zullo*, 20 Mass. L. Rptr. 293, 293 (Super. Ct. 2005) (same).

⁸⁷ See *supra* note 86.

⁸⁸ See *Doyle*, 2007 Mass. App. Div. at 45.

⁸⁹ See *McAlpine v. Patrick*, No. 86453, 2006 WL 562191, at *2 (Ohio Ct. App. Mar. 9, 2006) (holding claim preclusion does apply under Ohio statute and procedural rules); *McHenry v. Hubbard*, 134 P.2d 1107, 1110-15 (Kan. 1943) (reasoning claim preclusion would apply under Kansas statute at the time).

⁹⁰ 20 Mass. L. Rptr. 154 (Super. Ct. 2005).

⁹¹ *Id.* (summarizing tenants defense to rent obligations based on valid deed transfer).

⁹² *Id.* (discussing procedural history of case).

moved to amend his answer to raise his ownership claim as an affirmative defense, it appeared that the Superior Court had not addressed the motion prior to settlement of the case.⁹³

Based on this slightly odd procedural history, the court in *Young* held that the tenant had not clearly included his ownership claim within the summary process agreement for judgment, and was therefore not barred by issue preclusion.⁹⁴ The court went on to conclude, however, that the ownership claim was nevertheless barred by claim preclusion.⁹⁵ It reasoned that the ownership claim arose “out of the same set of facts as the original question of who possessed the contested property,” and therefore should have been litigated in the summary process action.⁹⁶ Interestingly, the court viewed the abortive attempt to include the ownership claim in the summary process action as “strong evidence” in support of its conclusion that the two cases arose out of the same set of facts.⁹⁷ The court does not appear to have considered the relevance of Rule 5 or any other aspects of summary process proceedings.⁹⁸

The decision in *Murray v. Zullo*⁹⁹ constitutes an even more expansive application of claim preclusion to a summary process action.¹⁰⁰ The tenant in *Murray* had not raised any counterclaims during the summary process action brought against her, in which she represented herself *pro se*.¹⁰¹ After judgment was entered in favor of the landlords in the summary process action, the tenant brought an affirmative suit alleging, *inter alia*, breaches of the implied warranty of habitability and covenant of quiet enjoyment, retaliation, and illegal transfer of responsibility for payment of utilities.¹⁰² In dismissing all of these claims, the court expressed a particularly broad understanding of the preclusive effect of summary process proceedings.¹⁰³ As in *Young*, the court in *Murray* made no

⁹³ *Id.* (noting record did not “indicate any action” by trial court on tenant’s motions).

⁹⁴ *Id.* (holding no issue preclusion).

⁹⁵ *Id.* at 154 (reasoning efficiency required finality on ownership claims).

⁹⁶ *Young*, 20 Mass. L. Rptr. at 154.

⁹⁷ *Id.*

⁹⁸ Beyond Rule 5, it is also surprising that the *Young* court did not consider chapter 239, section 7 of the Massachusetts General Laws, which expressly preserves the right of summary process litigants to bring subsequent actions settling title in the land. *See also supra* note 16 (discussing section 7).

⁹⁹ 20 Mass. L. Rptr. 293 (Super. Ct. 2005).

¹⁰⁰ *See id.* (reasoning plaintiff tenant “could and should have litigated” claims in summary process).

¹⁰¹ *Id.*

¹⁰² *Id.* (recounting plaintiff’s claims raised after summary process action).

¹⁰³ *See id.* at 295. The court reasoned that:

reference to Rule 5.¹⁰⁴

B. The Doyle Decision and Its Implications

In *Doyle v. Baltaks*,¹⁰⁵ the Appellate Division directly considered, and rejected, the argument that Rule 5 protects tenants from the effects of claim preclusion.¹⁰⁶ The case involved a suit by a former tenant against his landlord for, *inter alia*, breach of the warranty of habitability and violation of the security deposit statute.¹⁰⁷ The parties had previously participated in a summary process action, in which the tenant had raised counterclaims based on similar allegations concerning the condition of the premises.¹⁰⁸ The previous action had ended with an agreement for judgment in favor of the landlord.¹⁰⁹ The trial court, consistent with the trend noted in the previous section, dismissed all but one of the tenant's claims on the basis of claim preclusion.¹¹⁰

On appeal, the Appellate Division court first noted that the summary process action did have preclusive effect in the present case.¹¹¹

The guiding principle here is that [the tenant] is precluded from litigating not only those claims that were actually decided in the summary process action, but also those that could have been brought in that action By entering a judgment for the [landlords] in the summary process action, the Natick District Court judge necessarily determined that the [landlords] had properly terminated the tenancy and were entitled to gain possession of the Apartment. Although [the tenant] did not assert any counterclaims or affirmative defenses . . . the summary process action was the proceeding in which to raise these issues. Because the facts [the tenant] now asserts . . . all grew out of the same transaction or occurrence (namely, the tenancy), the district court's decision prevents her from litigating those claims later in this new forum.

Id. at 295 (internal citation omitted).

¹⁰⁴ See *Young v. Estate of Lapolito*, 20 Mass. L. Rptr. 154, 154 (Super. Ct. 2005); *Murray*, 20 Mass. L. Rptr. at 293.

¹⁰⁵ 2007 Mass. App. Div. 43 (App. Div. 2007).

¹⁰⁶ See *id.* at 45.

¹⁰⁷ *Id.* at 43.

¹⁰⁸ *Id.* The counterclaims in the first action included allegations of defects, failure to provide heat, hot water, smoke detectors, cross-metering of utilities, and unfair and deceptive acts in violation of Mass. Gen. Laws ch. 93(a). *Id.* The later suit, commenced by the tenant, included claims for violations of the security deposit statute, breach of the warranty of habitability, cross-metering, and unfair debt collection. *Id.*

¹⁰⁹ *Id.* The agreement provided that Doyle would pay back rent and Baltaks would dismiss the case with prejudice.

¹¹⁰ See *id.* at 43 (describing trial court's dismissal of all claims except for unfair debt collection).

¹¹¹ *Doyle*, 2007 Mass. App. Div. at 45.

Although the Appellate Division acknowledged the permissive nature of counterclaims in summary process actions under Rule 5, it held that “the doctrine of claim preclusion still bars matters that ‘were or should have been adjudicated’ in a prior action.”¹¹² The court also upheld dismissal of the tenant’s claims based on the condition of the apartment, which it found not only should have been, but actually were, litigated in the summary process action.¹¹³ By contrast, the court reversed dismissal of the security deposit claims, reasoning that they were “separate and distinct claims and may well have been premature at the time of the original summary process action.”¹¹⁴

Despite its seemingly broad assertion that claim preclusion doctrine applies in summary process,¹¹⁵ the *Doyle* opinion contains two important ambiguities: its unexplained reference to small claims actions and its incomplete delineation of the scope of claim preclusion in summary process. First, in concluding that summary process actions have claim preclusive effect, the court explicitly invoked its analogous treatment of small claims actions.¹¹⁶ As with summary process proceedings, all counterclaims in small claims actions are deemed permissive by court rule.¹¹⁷ The Appellate Division has nevertheless held that a defendant in small claims is prohibited from engaging in claim splitting.¹¹⁸ That is, if the defendant chooses to raise any counterclaims within the small claims case, he or she is precluded from raising related claims in any other forum.¹¹⁹ Similarly, in *Doyle*, the court may have intended to limit its holding to a prohibition against claim splitting in summary process. This would mean that, as long as the tenant did not raise any counterclaims in summary process, the action would have no claim preclusive effect.¹²⁰

¹¹² *Id.* at 44 (quoting *Bagley v. Moxley*, 555 N.E.2d 229, 231 (Mass. 1990)).

¹¹³ *Id.* at 45.

¹¹⁴ *Id.*

¹¹⁵ *Id.* at 44 (quoting *Bagley v. Moxley*, 555 N.E.2d 229, 231 (Mass. 1990)).

¹¹⁶ *Doyle*, 2007 Mass. App. Div. at 44-45 (citing *Donovan v. Ford*, 1989 Mass. App. Div. 219, 220 (App. Div. 1989) (holding that doctrine of issue preclusion applied to counterclaims in small claims actions)).

¹¹⁷ See UNIF. SMALL CLAIMS R. 3(c) (stating “such claims shall not be compulsory”).

¹¹⁸ See *Woofenden v. Merriam*, 1985 Mass. App. Div. 21, 23 (App. Div. 1985) (“While it was not compulsory on *Woofenden* to file a counterclaim they elected to do so and must therefore be bound by the result.” (citation omitted)).

¹¹⁹ *Id.*

¹²⁰ One treatise on Massachusetts housing law recently adopted this intermediate position. See GEORGE WARSHAW, MASSACHUSETTS LANDLORD-TENANT LAW § 11:12[A] (2d ed. Supp. 2008). It explains the law as follows: “If [the tenant] filed no counterclaims in the housing court case . . . she could freely bring a claim . . . in the superior court. If, however, she had asserted counterclaims in the summary process case then she would have been required to assert all her claims in that action.” *Id.* Other Massachusetts legal scholars, however, appear to view *Doyle* as

Such a limitation would provide a logical reconciliation of Rule 5 with general claim preclusion principles.¹²¹ It would also make the holding in *Doyle* compatible with the Appeals Court's *dicta* in *Turner*, which appeared to reject the application of claim preclusion against a tenant who had not raised any counterclaims in his summary process action.¹²² However, in *Doyle*, the court did not spell out the reasoning behind its reference to small claims court practice, nor did it explicitly embrace a claim splitting approach. Therefore, there is no clear indication that the court intended to limit its holding to the practice of claim splitting, nor that it was knowingly contradicting the more expansive approach taken by the trial court in *Murray*.¹²³

The second ambiguity in the *Doyle* decision concerns the scope of the claim preclusion principle that the court appears to embrace.¹²⁴ Presumably, a claim will be precluded if it arises out of the same "transaction or occurrence"¹²⁵ as the summary process case, rather than being "separate and distinct."¹²⁶ The security deposit claim at issue in *Doyle* was not precluded, in part because the court found it to be both legally and factually distinct from the earlier summary process case.¹²⁷ By contrast, at least one court has suggested that a negligence claim against a landlord for an injury occurring on the premises *would* be precluded if not raised in summary process.¹²⁸ These two data points alone, however, do not

mandating a more expansive role for claim preclusion. See MARK G. PERLIN & JOHN M. CONNORS, HANDBOOK OF CIVIL PROCEDURE IN THE MASSACHUSETTS DISTRICT COURT § 14.27 n.85 (4th ed. 2009) (noting *Doyle* court's acknowledgment of permissive nature of counterclaims and nevertheless allowing claim preclusion); DAHER & CHOPP, *supra* note 1, at § 16:13 ("Despite the permissive nature of counterclaims in summary process cases, however, the doctrine of claim preclusion still may bar matters that were or should have been adjudicated in a prior action.").

¹²¹ Specifically, under the claim splitting approach, both Rule 5 and claim preclusion principles would have meaningful roles in summary process. Rule 5 would protect tenants from the effect of claim preclusion so long as no counterclaims were raised; otherwise, ordinary claim preclusion principles would apply. See *supra* text accompanying notes 71-78 (describing possible approaches to reconciling Rule 5 with claim preclusion doctrine).

¹²² See *supra* notes 81-84 and accompanying text (discussing *Turner* court's decision).

¹²³ See *supra* notes 100-104 and accompanying text (discussing *Murray* court's decision).

¹²⁴ See *Doyle v. Baltaks*, 2007 Mass. App. Div. 43, 44-45 (App. Div. 2007).

¹²⁵ MASS. R. CIV. P. 13(a) (defining claims to be treated as compulsory in ordinary civil proceedings).

¹²⁶ *Doyle*, 2007 Mass. App. Div. at 45. Although the meaning of "separate and distinct" is not further clarified by the court, it is presumably intended to be mutually exclusive of the standard for compulsory counterclaims under Massachusetts Rule of Civil Procedure 13.

¹²⁷ See *id.* at 45.

¹²⁸ See *Pedini v. Y & Y Realty, Inc.*, 1987 Mass. App. Div. 189, 190-91 (App. Div. 1987). Although worthy of mention, this case is not afforded great weight because it is unclear whether the court was applying issue or claim preclusion, and because it is not cited in the more recent *Doyle* opinion.

provide enough information to predict what kinds of claims will be viewed as sufficiently separate and distinct from a summary process case as to escape preclusion.

One example of a claim whose status remains unsettled is that of retaliatory eviction for a tenant's complaints about the condition of the unit.¹²⁹ Understood broadly, this claim arises out of the central summary process issue of whether the landlord had a right to possession of the premises. It would also involve some of the same evidence as the landlord's claim for possession. There appears to be much room for continued disagreement on whether such a claim should be viewed as a part of, or separate and distinct from, a summary process case.¹³⁰

Putting aside these ambiguities for the moment, the decisions in *Young*, *Murray*, and *Doyle* all indicate that, under current Massachusetts law, summary process proceedings can reasonably be expected to have some degree of claim preclusive effect, at least before some trial and appellate judges.¹³¹ Unfortunately, because Massachusetts courts have yet to articulate a clear rule of decision for when claim preclusion will apply, it is difficult to predict the outcome of individual cases. Therefore, we now turn our attention to the treatment of analogous statutes in other jurisdictions, in order to see whether a sharper image emerges.

C. Out-of-State Comparisons

The disagreement among Massachusetts courts concerning the preclusive effect of summary process proceedings is not unique.¹³² State courts across the country, addressing similar, statutorily-created, expedited dispossession proceedings, have come to opposite conclusions on the claim preclusion question.¹³³ Even within a single state, confusion can arise.¹³⁴

¹²⁹ A landlord's retaliatory conduct may form the basis of both a defense against eviction and a counterclaim for damages. See MASS. GEN. LAWS ANN. ch. 239, § 2A (2004); see also MASS. GEN. LAWS ANN. ch. 186, § 18 (2003).

¹³⁰ See generally *Chedid v. Lee Street Realty, Inc.*, 1995 Mass. App. Div. 177, 178 (App. Div. 1995) (providing another possible source of guidance on question of treatment of retaliatory eviction claims). Although this case concerned the preclusive effect of a small claims action, the court did identify circumstances in which a tenant's claims about the condition of the premises would be distinct enough from a previous dispute that claim preclusion would not apply. See *id.*

¹³¹ See *Young v. Estate of Lapolito*, 20 Mass. L. Rptr. 154, 154 (Super. Ct. 2005) (finding tenant ownership claim barred by claim preclusion); *Murray v. Zullo*, 20 Mass. L. Rptr. 293, 293 (Super. Ct. 2005) (finding tenant's breach of implied warranty claim barred by claim preclusion); *Doyle v. Baltaks*, 2007 Mass. App. Div. 43, 44-45 (App. Div. 2007) (concluding claim preclusion applies to summary process counterclaims).

¹³² See *infra* note 136 and accompanying text (noting ongoing conflict among Ohio courts).

¹³³ Compare *Trust Co. Bank of Nw. Ga. v. Shaw*, 355 S.E.2d 99, 100 (Ga. Ct. App. 1987)

In Ohio, for example, intermediate-level appellate courts are split on whether the State's Forcible Entry and Detainer Act¹³⁵ preserves or prohibits the application of claim preclusion.¹³⁶ The Ohio example is particularly relevant because the Ohio statute, like Rule 5, has language appearing to limit the claim preclusive effect of forcible entry and detainer actions.¹³⁷

Thus, consideration of out-of-state precedent is unlikely to resolve the murkiness in the Massachusetts case law. The degree to which expedited dispossessory proceedings are intended to displace the traditional rules of issue and claim preclusion remains a central, unresolved question. This question is particularly acute in states such as Massachusetts and Ohio, where a statute or procedural rule governing the expedited dispossessory proceeding seems to conflict with claim preclusion principles.¹³⁸ State courts simply do not appear to have arrived at a definitive answer.

Although they may not be able to resolve the conflict surrounding claim preclusion, a closer examination of certain opinions from jurisdictions outside of Massachusetts can provide insight into the competing views underlying the debate. In attempting to resolve the apparent tension between statutory language implying rejection of claim preclusion and traditional claim preclusion principles, courts have articulated at least two plausible, yet contradictory, interpretations of the law.¹³⁹ Despite each state's unique legislative and common law history, the

(reasoning tenant's claims barred by claim preclusion because "dispossessory proceedings do not dispense with" claim preclusion rules), *with* *Allen v. Seventy-Seven Acres*, 48 Va. Cir. 318, 321-22 (1999) (holding claim preclusion did not bar tenant's Virginia Law claims in subsequent action).

¹³⁴ See Bruce G. Perrone, *West Virginia's New Summary Eviction Proceedings: New Questions for an Old Answer*, 87 W. VA. L. REV. 359, 370-72 (1985) (recounting confusion regarding claim preclusive effect on landlords of new summary process statute).

¹³⁵ OHIO REV. CODE ANN. § 1923.01-1923.15 (2004).

¹³⁶ Compare *McAlpine v. Patrick*, No. 86453, 2006 WL 562191, at *2 (Ohio Ct. App. Mar. 9, 2006) (allowing tenant's claims to survive because claim preclusion was not applicable), *with* *Forney v. Climbing Higher Enters., Inc.*, 815 N.E.2d 722, 727 (Ohio Ct. App. 2004) (holding that claim preclusion does not apply); see also Kimberly E. O'Leary, *The Inadvisability of Applying Preclusive Doctrines to Summary Evictions*, 30 U. TOL. L. REV. 49, 67-72 (1998) (summarizing conflicting rulings among Ohio courts).

¹³⁷ See § 1923.03 ("[J]udgments under this chapter are not a bar to a later action brought by either party.").

¹³⁸ See *id.*; MASS. UNIF. SUMM. PROCESS R. 5 ("Counterclaims shall not be considered compulsory; that is, they shall not be considered waived for the purpose of a separate civil action or actions if not asserted in a summary process action . . .").

¹³⁹ Compare *McHenry v. Hubbard*, 134 P.2d 1107, 1115 (Kan. 1943) (arguing claim preclusion applied to expedited dispossessory proceeding because it provided full opportunity to litigate), *with* *J.A.M. Corp. v. AARO Disposal, Inc.*, 600 N.W.2d 617, 621 (Mich. 1999)

general attitudes expressed by these out-of-state courts may illuminate the conflicting preclusion positions in Massachusetts.

In *McHenry v. Hubbard*,¹⁴⁰ the Supreme Court of Kansas issued an intriguing analysis of the preclusion issue.¹⁴¹ Kansas considered and rejected a tenant's attempt to bring suit based on claims that he had previously raised and litigated as counterclaims in an expedited dispossessory action.¹⁴² Although the court was not precisely focused on the issue of claim preclusion, it did provide an interesting argument for the applicability of general preclusion principles in the context of expedited dispossessory proceedings.¹⁴³ The court acknowledged the relevant Kansas statute at the time, which provided that judgments in expedited dispossessory actions "shall not be a bar to any after action brought by either party."¹⁴⁴ Nevertheless, after a lengthy review of prior decisions and relevant legislative history, the court concluded that "a more reasonable interpretation" of this provision was that it protected only those claims that were impossible to bring in the expedited dispossessory proceeding.¹⁴⁵ For example, a tenant could bring "another action based in part on something which transpired after the first judgment or on some matter which could not be joined, or was beyond the justice's jurisdiction"¹⁴⁶ However, applying the court's reasoning, a claim that could have been raised in the expedited dispossessory proceeding would still be barred by claim preclusion.

The *McHenry* court further concluded that its interpretation of the statute did not unjustly infringe upon either party's right to a full and fair

(reasoning claim preclusion did not apply because of "swift[]" nature of expedited dispossessory proceeding).

¹⁴⁰ 134 P.2d 1107 (Kan. 1943).

¹⁴¹ *Id.* at 1110-14 (analyzing tenant attempt to bring suit based on previously litigated counterclaims).

¹⁴² *See id.* at 1108-09.

¹⁴³ *See id.* The court focused on issue preclusion, rather than claim preclusion. *See id.* at 1115 (stating defendant attempted "to again litigate the very facts" resolved in previous case). *McHenry* provided a justification for finding issue preclusion in the case, however, that applies to preclusion principles generally and is arguably relevant to the Massachusetts debate. *See infra* notes 144-152 (describing relevant aspects of holding).

¹⁴⁴ *Id.* (quoting KAN. STAT. ANN. § 61-1303 (1935)). The Kansas statute at issue in *McHenry* was repealed by KAN. STAT. ANN. § 61-2606 (1969). Under the current statutory scheme, at least one court has held that claim preclusion does not apply to a tenant's counterclaims. *See Kincaid v. Sturdevant*, 437 F. Supp. 2d 1219, 1225 (D. Kan. 2006) (noting KAN. STAT. ANN. § 61-3802 (2005) now specifies circumstances under which counterclaims may be barred in later actions).

¹⁴⁵ *See McHenry*, 134 P.2d at 1114-15 (outlining statutory interpretation of court).

¹⁴⁶ *Id.* at 1114.

adjudication of its claims.¹⁴⁷ The court reasoned that both sides had the opportunity to appeal from the decision in the expedited dispossessory action.¹⁴⁸ Thus, once Kansas law made it possible to take an appeal from an expedited dispossessory proceeding, it nullified any equitable justification for a broader reading of the statute.¹⁴⁹

In sum, on the *McHenry* court's view, statutory language indicating that expedited dispossessory proceedings will not be a "bar" to later actions should be interpreted as merely reinforcing traditional claim preclusion principles.¹⁵⁰ Such proceedings will have claim preclusive effect to the extent that claims could have been raised in that proceeding.¹⁵¹ Furthermore, in light of a tenant's right to appeal from an adverse judgment in an expedited dispossessory proceeding, there is no significant concern that a tenant's valid claims will be unjustly denied or ignored by the courts.¹⁵²

In contrast, *J.A.M. Corp. v. AARO Disposal, Inc.*,¹⁵³ presents a starkly different vision of the role of claim preclusion in expedited dispossessory proceeding. In *J.A.M. Corp.*, the Supreme Court of Michigan held that claim preclusion would not bar claims that a tenant could have, but failed to raise in an earlier expedited dispossessory proceeding.¹⁵⁴ The court based its decision on a portion of the statute governing expedited dispossessory proceedings, which, like the Kansas statute in *McHenry*, provides that "[a] judgment for possession under this chapter does not merge or bar any other claim for relief."¹⁵⁵ Unlike *McHenry*, however, the Michigan Supreme Court interpreted this provision as evidence of

¹⁴⁷ *Id.* at 1115 (stating defendant could have but failed to "perfect" his appeal from expedited dispossessory proceeding).

¹⁴⁸ *See id.* at 1107 (noting statutory amendment allowing for appeal).

¹⁴⁹ *Id.*

¹⁵⁰ *See McHenry*, 134 P.2d at 1114-15 (interpreting statute to protect only claims tenant could not have raised in expedited dispossessory proceeding). Claim preclusion only applies to claims that could have been raised in the earlier action. *See supra* note 7 and accompanying text (explaining traditional scope of claim preclusion); *see also* *Bradford v. Richards*, 417 N.E.2d 1234, 1235 (Mass. App. Ct. 1981) (noting claim not barred because prior proceeding "had no jurisdiction over the settlement of estates"). Thus, the *McHenry* court did not diverge from basic claim preclusion principles in suggesting that an expedited dispossessory proceeding judgment would not preclude claims based on events "which transpired after the first judgment," or other claims that could not have been joined to the earlier action. 134 P.2d at 1114-15.

¹⁵¹ *McHenry*, 134 P.2d at 1114-15.

¹⁵² *See id.* at 1115.

¹⁵³ 600 N.W.2d 617 (Mich. 1999).

¹⁵⁴ *See id.* at 621-22.

¹⁵⁵ *Id.* at 621 (citing MICH. COMP. LAWS ANN. § 600.5750 (2000)). The statute does bar some claims involving forfeiture of an executory land sale contract, which are not relevant here. § 600.5750.

legislative intent to take expedited dispossessory proceedings “outside the realm of the normal rules concerning merger and bar in order that attorneys would not be obliged to fasten all other pending claims to the swiftly moving summary proceedings.”¹⁵⁶

On this alternative view, the *McHenry* court was wrong to interpret statutory language indicating that expedited dispossessory proceedings will not be a bar to later actions as mere reinforcement of traditional claim preclusion principles.¹⁵⁷ Rather, according to the *J.A.M. Corp.* court, this language is intended to *remove* claim preclusion from such proceedings all together.¹⁵⁸ Indeed, the very purpose of an expedited proceeding would be undermined if lawyers felt obliged to append a multitude of related claims, lest they be barred by claim preclusion from raising them in a separate action. The *J.A.M. Corp.* court’s reasoning about the speedy nature of these proceedings could also be extended to challenge the *McHenry* court’s conclusion that appellate review is sufficient to guarantee a full and fair adjudication of all claims. This is because, in a “swiftly moving” proceeding, there may be a greater risk that the factual record for appeal will be flawed or incomplete.¹⁵⁹ One scholar, for example, has argued that the shortened timeline in Ohio dispossessory proceedings can hamper fact gathering.¹⁶⁰

¹⁵⁶ *J.A.M. Corp.*, 600 N.W.2d at 621.

¹⁵⁷ Compare *McHenry*, 134 P.2d at 1114 (interpreting language to mean judgment bars all but claims “which could not be joined”), with *J.A.M. Corp.*, 600 N.W.2d at 621-22 (interpreting language to mean “judgment . . . does not bar other claims for relief”).

¹⁵⁸ See *J.A.M. Corp.*, 600 N.W.2d at 621 (“Plainly the Legislature took [expedited dispossessory proceedings] outside the realm of the normal rules concerning merger and bar in order that attorneys would not be obliged to fasten all other pending claims to the swiftly moving summary proceedings.”).

¹⁵⁹ See O’Leary, *supra* note 136, at 74 (“[G]iven the expedited nature of the [Ohio dispossessory] action, there simply is not sufficient time to engage in thorough fact-finding before a possession hearing.”).

¹⁶⁰ See *id.* O’Leary’s article illustrates the difficulties facing a tenant in the early days of a summary process action:

A[n expedited dispossessory] action moves very quickly . . . [A] tenant who learns of the intent of a landlord to evict on day one may be required to present defenses to that eviction on day ten. During those ten days, the tenant must make an appointment with a lawyer, or prepare to defend him or herself, and analyze the complaint . . . Also during that ten days, information must be uncovered or discovered, witnesses procured, and documents obtained. It is not difficult to understand how defenses to possession actions might be less than adequately presented - witnesses may be unavailable, documents unobtainable, and people unwilling to talk. The normal time frame in which to conduct discovery must be shortened by leave of court and, given the expedited nature of the action, there simply is not sufficient time to engage in thorough fact-finding before a possession hearing.

The *McHenry* and *J.A.M. Corp.* opinions demonstrate that a court can conceive of a statutory scheme creating expedited dispossessory proceedings in at least two ways. On one view, the statute creates a special proceeding that, to the greatest extent possible, mirrors the claim preclusion principles of ordinary cases.¹⁶¹ On the other view, the statute creates a special proceeding whose characteristics make the application of claim preclusions principles of ordinary cases inappropriate.¹⁶² Statutory language indicating that judgments in such proceedings will not bar later actions does not decisively settle this debate.

D. Conclusions from the Case Law

A review of judicial precedent both within and beyond Massachusetts has left us with surprisingly little guidance as to the likely claim preclusive effect of a given summary process action. A Massachusetts court deciding whether to allow a tenant to bring claims that could have been raised in an earlier summary process proceeding appears to have at least three options. First, a court may conclude that claim preclusion principles apply in full, in which case all of the tenant's claims arising out of the tenancy will be barred.¹⁶³ Second, a court may conclude that claim preclusion principles do not apply at all, in which case none of the tenant's claims will be barred unless they were actually litigated in the summary process proceeding.¹⁶⁴ Third, a court may conclude that only the claim preclusion rule against claim splitting applies, in which case *all* of the tenant's claims arising out of the tenancy will be barred if *any one of them* was raised in the summary process proceeding.¹⁶⁵ Although the third option is perhaps most likely given recent guidance from the Massachusetts Appellate Division,¹⁶⁶ all three approaches appear to have support in the

Id.

¹⁶¹ See *supra* notes 140-152 and accompanying text (summarizing the *McHenry* approach).

¹⁶² See *supra* notes 153-156 and accompanying text (summarizing the *J.A.M. Corp.* approach).

¹⁶³ See *Murray v. Zullo*, 20 Mass. L. Rptr. 293, 293 (Super. Ct. 2005) (granting defendant landlord's motion for summary judgment); *McHenry v. Hubbard*, 134 P.2d 1107, 1114-15 (Kan. 1943) (reasoning plaintiff forfeited opportunity to assert claims by failing to raise them in previous proceedings).

¹⁶⁴ See *Turner v. Cmty. Homeowner's Ass'n, Inc.*, 816 N.E. 2d 537, 544 n. 12 (Mass. App. Ct. 2004) (suggesting MASS. UNIF. SUMM. PROCESS R. 5 may protect all tenant claim from claim preclusion); *J.A.M. Corp. v. AARO Disposal, Inc.*, 600 N.W.2d 617, 621-22 (Mich. 1999) (holding claim preclusion rules did not bar plaintiff tenants claims).

¹⁶⁵ See *Doyle v. Baltaks*, 2007 Mass. App. Div. 43, 44-45 (App. Div. 2007) (dismissing claims of plaintiff tenant who had engaged in claim splitting).

¹⁶⁶ See *supra* notes 115-120 and accompanying text (suggesting a rule against claim splitting

case law.¹⁶⁷ These variant positions arise out of conflicting interpretations of expedited dispossessory proceedings in light of traditional claim preclusion principles.

From this web of legal precedent, however, at least one conclusion can be safely drawn: claim preclusion *may* apply to bar tenants from bringing claims that they failed to raise in previous summary process proceedings.¹⁶⁸ Of course, for tenants, the consequences of this fact will depend on individual judges' interpretations of the law as well as the circumstances of their particular cases. For policymakers, judges and lawyers, however, the consequence is more clear: the risk of claim preclusion cannot be ignored in the development or application of the summary process device.

IV. MISGUIDED RELIANCE ON RULE 5 IN THE LEGAL COMMUNITY

Under current Massachusetts case law, there is no clear or consistently enforced degree of protection for tenants in summary process proceedings from the effects of claim preclusion. Nevertheless, both housing court practitioners and judges appear to act on the assumption that such protection exists.¹⁶⁹ Although this assumption relies on an all together reasonable reading of the summary process rules and statute, it is not the reading shared by the three Massachusetts courts discussed in the previous section.¹⁷⁰ The result is a lose-lose situation for tenants.

A court may dismiss any claims tenants have against their landlords on claim preclusion grounds if not raised in summary process.¹⁷¹

as likely interpretation of *Doyle* holding).

¹⁶⁷ See *supra* notes 81-131 and accompanying text (surveying Massachusetts case law).

¹⁶⁸ See *Doyle*, 2007 Mass. App. Div. at 44-45 (concluding claim preclusion applies to summary process counterclaims); *Murray v. Zullo*, 20 Mass. L. Rptr. 293, 293 (Super. Ct. 2005) (finding tenant's breach of implied warranty claim barred by claim preclusion); *Young v. Estate of Lapolito*, 20 Mass. L. Rptr. 154, 154 (Super. Ct. 2005) (finding tenant ownership claim barred by claim preclusion).

¹⁶⁹ See STEFANIE BALANDIS ET AL., *LEGAL TACTICS: TENANTS' RIGHTS IN MASSACHUSETTS: PRIVATE HOUSING* (Annette R. Duke ed., 7th ed. 2008) (consisting of housing law guide written by practitioners omitting issue of claim preclusion); *Restoration Hous. Corp. v. Wilson*, No. 97-03620, slip op. at 2 (Hous. Ct. Dep't Order Oct. 2, 1997) (expressing view that claim preclusion does not apply); see also *infra* notes 180-185, 192 and accompanying text (describing attitudes of housing court practitioners and judges).

¹⁷⁰ See *supra* note 168. But see *Turner v. Cmty. Homeowner's Ass'n, Inc.*, 816 N.E. 2d 537, 544 n. 12 (Mass. App. Ct. 2004) (reversing summary judgment and suggesting claim preclusion may be inapplicable).

¹⁷¹ See *supra* note 168 (observing cases where tenants' claims were dismissed because claims were not raised in previous proceedings).

At the same time, however, those parties within the summary process proceeding who are most capable of correcting or minimizing the harm to tenants from this claim preclusion regime are largely unaware of the danger.¹⁷² This blindness among members of the legal community poses a threat to tenants' rights that is equal to, if not greater than, claim preclusion itself.

A. Legal Service Providers

Perhaps the most significant example of reliance on Rule 5 as a protection for tenants in summary process is among those who represent them. Many tenants facing eviction in Massachusetts turn to legal services providers, either for full representation or for self-help advice.¹⁷³ Statistics from Greater Boston Legal Services ("GBLS") provide some indication of the significant role such organizations play.¹⁷⁴ GBLS attorneys offer a variety of free legal services to low-income individuals in and around Boston.¹⁷⁵ With respect to summary process actions, GBLS offers full representation in certain cases in addition to clinics at the housing court and at their own facilities each week.¹⁷⁶ During these sessions tenants can get advice about defending against evictions *pro se*.¹⁷⁷ In 2008, GBLS' housing unit alone handled approximately 4,018 individual cases.¹⁷⁸

No comprehensive survey exists of the strategies pursued by individual legal services providers, and indeed practices are likely to vary based on the resources available to the attorneys at a particular time and the needs of a given client. However, a useful indicator of common practice

¹⁷² See *supra* note 169 (identifying presumption of claim preclusion protection).

¹⁷³ In the Boston area alone, such providers include: Greater Boston Legal Services, see Housing Unit, <http://www.gbls.org/housing/representation.htm> (last visited Jan. 10, 2010); the Volunteer Lawyers Project, see Volunteer Opportunities, <http://www.vlpnet.org/volunteer/> (last visited Jan. 10, 2010); the Harvard Legal Aid Bureau, see Practice Areas, <http://www.law.harvard.edu/students/orgs/hlab/practice.php> (last visited Jan. 10, 2010); and the WilmerHale Legal Services Center, see Overview of Services, <http://www.law.harvard.edu/academics/clinical/lsc/help/overview.htm> (last visited Jan. 10, 2010).

¹⁷⁴ GREATER BOSTON LEGAL SERVICES, 2008 ANNUAL REPORT 6 (2008), available at <http://www.gbls.org/Report.htm>.

¹⁷⁵ See Greater Boston Legal Services, Types of Services, <http://www.gbls.org/service.htm> (last visited Jan. 10, 2010); see also Service Area, <http://www.gbls.org/area.htm> (last visited Jan. 10, 2010).

¹⁷⁶ See Greater Boston Legal Services, Types of Services, *supra* note 175 (outlining services provided by GBLS).

¹⁷⁷ See Housing Unit, *supra* note 173 (describing GBLS Housing Unit services).

¹⁷⁸ See GREATER BOSTON LEGAL SERVICES, *supra* note 174, at 6 (providing statistics about GBLS Housing Unit).

can be found in *Legal Tactics: Tenants' Rights in Massachusetts*.¹⁷⁹ This self-help guide to Massachusetts landlord tenant law is written and edited by many of the leaders of organizations providing both free and paid legal services to Massachusetts tenants.¹⁸⁰ On the issue of counterclaims, *Legal Tactics* does not reference any of the cases in which Massachusetts courts have applied claim preclusion to tenant counterclaims; indeed, it quite explicitly relies on the assumption that claim preclusion will *not* apply.¹⁸¹ Citing to Rule 5, it instructs tenants as follows: "If you have a claim against your landlord and you do not bring it as a counterclaim in an eviction case, you still have the right to file a separate lawsuit on that claim."¹⁸² The guide then goes on to suggest that tenants *not* bring personal injury and lead paint poisoning claims in summary process proceedings.¹⁸³ It points out that such claims can prove to be very legally complex and that more time may be desirable to allow for injuries to fully develop.¹⁸⁴ Tenants following the advice of *Legal Tactics*, therefore, would likely be making themselves most vulnerable to claim preclusion by raising some, but not all, of their counterclaims in their summary process proceedings.¹⁸⁵

¹⁷⁹ See BALANDIS ET AL., *supra* note 169.

¹⁸⁰ The authors of this housing law guide for tenants include: a senior housing attorney at GBLS, the Managing Attorney of the Harvard Legal Aid Bureau, and a private attorney who also teaches landlord/tenant law clinics for the National Lawyers Guild Street Law Project. See Stefanie Balandis, <http://www.linkedin.com/pub/b/646/716> (last visited Jan. 10, 2010); Clinical Staff, http://www.law.harvard.edu/students/orgs/hlab/about_clinical.php (last visited Jan. 10, 2010); Jeffrey M. Feuer, http://www.goldsteinandfeuer.com/Attorneys.shtml/2183505_1 (last visited Jan. 10, 2010).

¹⁸¹ See BALANDIS ET AL., *supra* note 169, at 227.

¹⁸² *Id.*

¹⁸³ *Id.* at 227-28.

¹⁸⁴ *Id.* A similar approach is reflected in the Harvard Legal Aid Bureau's Summary Process Manual for its attorneys. See HARVARD LEGAL AID BUREAU, SUMMARY PROCESS MANUAL 204-05 (Andrew D. O'Toole ed., 1998). Relying on Rule 5, the manual reasons that the only risk of preclusion would come from inadvertently *litigating* the personal injury claim in summary process, thereby making it subject to issue preclusion in a subsequent case. *Id.* The manual does, however, recommend that an attorney "inform the opponent in writing . . . that the tenant intends to bring a separate suit." *Id.* at 205. Such a precaution might be sufficient to protect the tenant from the effects of claim preclusion if it could be argued that the landlord tacitly consented to the claim splitting. See, e.g., *Diversified Mortg. Investors v. Viking General Corp.*, 450 N.E.2d 176, 179 (Mass. App. Ct. 1983) (citing RESTATEMENT (SECOND) OF JUDGMENTS § 26(1)(a) (1980) for the proposition that "a party may consent effectively to the separate litigation of related claims"). But see 18 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 4415 (3d ed. 1998) ("It is not even safe for a plaintiff to attempt an express reservation of part of the claim in the complaint, relying on the absence of objection to preserve a second action.").

¹⁸⁵ At least two Massachusetts courts, including an appellate court, have applied claim preclusion to claim splitting, where a tenant raises some, but not all, of their claims in summary process. See *Young v. Estate of Lapolito*, 20 Mass. L. Rptr. 154, 154 (Super. Ct. 2005); *Doyle v. Baltaks*, 2007 Mass. App. Div. 43, 44-45 (App. Div. 2007). Only one Massachusetts court has

Admittedly, the risk of claim preclusion may not be of great concern to most tenants, who are primarily interested in maintaining possession of their units.¹⁸⁶ These tenants are unlikely to have the resources necessary for pursuing affirmative suits against their landlords in the future.¹⁸⁷ Furthermore, in preparing self-help advice for tenants, *Legal Tactics* must balance legal accuracy against clarity and focus of presentation. In light of these concerns, it may well not make sense to include the intricacies of claim preclusion doctrine in a self-help guide. Nevertheless, the guide's clear assertion that claim preclusion will not apply, as well as its willingness to encourage claim splitting by tenants, appears to reflect a degree of confidence among advocates that Rule 5 will protect tenants from the effects of claim preclusion.¹⁸⁸

The *Legal Tactics* example strongly suggests that attorneys representing tenants in summary process cases are not generally accounting for the risk of claim preclusion when formulating their defense strategies. Of course, whatever weaknesses may exist in the strategies of attorneys, it is even more likely that tenants do not account for these risks when they act without legal advice.¹⁸⁹ The basic assumption that tenants will be protected

applied claim preclusion to a tenant who omitted all counterclaims in summary process. See *Murray v. Zullo*, 20 Mass. L. Rptr. 293, 293 (App. Div. 2005). The former practice therefore appears most dangerous for tenants under current Massachusetts law. *Id.*

¹⁸⁶ See LEWIS POWELL, BOSTON BAR ASS'N TASK FORCE ON EXPANDING THE CIVIL RIGHT TO COUNSEL, GIDEON'S NEW TRUMPET: EXPANDING THE CIVIL RIGHT TO COUNSEL IN MASSACHUSETTS 8-9 (September 2008), available at http://www.bostonbar.org/prs/nr_0809/GideonsNewTrumpet.pdf (describing the importance of preserving one's shelter when faced with eviction).

¹⁸⁷ See *id.* at 3 (noting that most tenants facing eviction are unrepresented).

¹⁸⁸ See *supra* notes 179-185 and accompanying text.

¹⁸⁹ See AMERICAN BAR ASSOCIATION, TASK FORCE ON ACCESS TO CIVIL JUSTICE, REPORT TO THE HOUSE OF DELEGATES 9-10 (2006), available at <http://www.abanet.org/legalservices/sclaid/downloads/06A112A.pdf> (resolution urging governments to provide legal counsel as of right in certain civil cases). In advocating for a right to counsel in at least certain civil contexts, including housing cases, the American Bar Association has presented a grim view of *pro se* litigants' abilities to represent themselves in legal proceedings:

The American system of justice is inherently and perhaps inevitably adversarial and complex. It assigns to the parties the primary and costly responsibilities of finding the controlling legal principles and uncovering the relevant facts, following complex rules of evidence and procedure and presenting the case in a cogent fashion to the judge or jury. Discharging these responsibilities ordinarily requires the expertise lawyers spend three years of graduate education and more years of training and practice acquiring. With rare exceptions, non-lawyers lack the knowledge, specialized expertise and skills to perform these tasks and are destined to have limited success no matter how valid their position may be, especially if opposed by a lawyer. Not surprisingly, studies consistently show that legal representation makes a major difference in whether a party wins in cases decided in the courts.

from the effects of claim preclusion is not unreasonable, or even surprising, in light of the facially straightforward language of Rule 5.¹⁹⁰ Nevertheless, as the recent Massachusetts case law suggests, this degree of confidence among attorneys is almost certainly no longer warranted.¹⁹¹

B. Judges in Summary Process Cases

Unsurprisingly, legal practitioners are not alone in regarding summary process counterclaims as immune from claim preclusion. The courts in which they practice appear to share this assumption. For example, one housing court judge dismissing a tenant's summary process counterclaims, stated: "The defendant can certainly bring an independent complaint since counterclaims in summary process are merely permissive and not compulsory."¹⁹² As was seen with respect to legal service providers, Rule 5 appears to have also given housing court judges unwarranted confidence that tenants' summary process counterclaims will be protected from the effects of claim preclusion. This section reviews two areas of judicial determination in which courts' apparent reliance on Rule 5 may unduly prejudice tenants.

1. Motions to Amend Answers

In summary process, any counterclaims not included in a tenant's answer are deemed waived "unless the court shall otherwise order on motion for cause shown."¹⁹³ Answers are due within a week of the date on which the landlord enters the action with the court.¹⁹⁴ Even assuming a

Id.; see also POWELL, *supra* note 186, at 8-9 (describing need for legal representation in Massachusetts summary process cases).

¹⁹⁰ Compare BALANDIS ET AL., *supra* note 169 (neglecting to address claim preclusion), with MASS. UNIF. SUMM. PROCESS R. 5 (stating counterclaims not compulsory in summary process actions).

¹⁹¹ See *supra* Part III (surveying Massachusetts case law regarding claim preclusion in summary process proceedings).

¹⁹² Restoration Hous. Corp. v. Wilson, No. 97-03620, slip op. at 2 (Hous. Ct. Dep't Order Oct. 2, 1997); see also Ednson Realty Trust v. Robinson, No. 88-SP-7252-C, slip op. at 4-5 (Hous. Ct. Dep't Order Nov. 21, 1988) (suggesting tenant counterclaims are governed by MASS. R. CIV. P. 13 (b), which would protect these claims from preclusion).

¹⁹³ MASS. UNIF. SUMM. PROCESS R. 5; see also Morrison v. Estrella, No. 07H84SP002357, slip op. at 1 (Hous. Ct. Dep't Order Feb. 27, 2008) (allowing tenant's motion to amend in part and denying in part); Turner v. Settle, No. 06-CV-00029, slip op. at 1 (Hous. Ct. Dep't Order Mar. 31, 2006) (allowing defendant's motion to amend answer and add counterclaim); CMJ v. Stallworth, No. 98-04095, slip op. at 2 (Hous. Ct. Dep't Order Sept. 8, 1998) (allowing tenant's motion to amend counterclaim).

¹⁹⁴ MASS. UNIF. SUMM. PROCESS R. 3 (outlining timetable for summary process

tenant is able to obtain legal advice, this expedited schedule does not allow much time to thoroughly identify and develop possible counterclaims by the time the initial answer is due.¹⁹⁵ Tenants may therefore find it necessary to seek the court's permission to amend their answers in order to include valid counterclaims that were inadvertently omitted.¹⁹⁶

Claim preclusion can apply even against a party who attempted to include counterclaims in an unsuccessful motion to amend.¹⁹⁷ Judicial willingness to grant motions to amend is thus a crucial element in protecting tenants from the detrimental effects of claim preclusion. At the very least, courts should weigh the threat of claim preclusion when considering motions to amend answers. However, comparing decisions from general civil practice and summary process proceedings, it appears that courts in summary process are relatively insensitive to the risks facing tenants whose motions to amend are denied.¹⁹⁸

In ordinary practice, motions to amend are to be "freely given."¹⁹⁹ This rule reflects an "expressed tendency . . . in favor of allowing amendments, and a motion to amend should be allowed unless some good reason appears for denying it."²⁰⁰ The Massachusetts Court of Appeals has suggested, however, that this generally liberal attitude should be tempered in summary process, where "time is of the essence" and the goal is to achieve a "just, speedy, and inexpensive determination of every summary process action."²⁰¹ As the court reasoned, this "objective is defeated if the

proceeding). In an eviction for nonpayment of rent, a tenant must receive fourteen days notice of termination of the tenancy. MASS. GEN. LAWS ANN. ch. 186, §§ 11-12 (2003). The landlord can then serve him or her with summary process and, as few as seven days later, enter the action with the court. MASS. UNIF. SUMM. PROCESS R. 2(b). Under such circumstances, the tenant will have a total of 29 days from notice of eviction until the answer is due. *Id.*

¹⁹⁵ This risk has been recognized in the context of similarly expedited eviction procedures. See O'Leary, *supra* note 136, at 74 ("given the expedited nature of the action, there simply is not sufficient time to engage in thorough fact-finding before a possession hearing"); Jerrold B. Winer, *Pro Se Aspects of Hampden County Housing Court: Helping People Help Themselves*, 17 URB. L. ANN. 71, 78 (1979) (noting few properly filed summary process answers in Hampden Housing Court under expedited local rules).

¹⁹⁶ See *supra* notes 193-195 and accompanying text (discussing amendment of counterclaim during summary process).

¹⁹⁷ See *Travelers Ins. Co. v. Royal Ins. Co.*, 841 N.E.2d 287, 288-89 (Mass. App. Ct. 2006) (holding claim preclusion applied despite party's attempted amendment to pleading); RESTATEMENT (SECOND) OF JUDGMENTS § 26 cmt. b (1982) (stating unsuccessful attempt to amend does not protect denied amendments from claim preclusion).

¹⁹⁸ See *infra* notes 199-204 (comparing treatment of motions to amend in general civil practice and summary process).

¹⁹⁹ MASS. R. CIV. P. 15(a).

²⁰⁰ *Castellucci v. U. S. Fidelity & Guar. Co.*, 361 N.E.2d 1264, 1265 (Mass. 1977).

²⁰¹ MASS. UNIF. SUMM. PROCESS R. 1 and commentary; see also *Hodge v. Klug*, 604 N.E.2d 1329, 1335 (Mass. App. Ct. 1992) (asserting liberal claim amendment rules "tempered" by MASS.

pleadings are susceptible of late amendments which alter the agenda of the trial.”²⁰² Consistent with this reasoning, a tenant may be denied the right to amend in summary process, particularly if his or her motion is brought only shortly before trial.²⁰³ In one case, the court denied a tenant’s request to file a late answer and counterclaims at trial, even though she claimed that she had no attorney on the day the answer was due.²⁰⁴

Denials of tenants’ motions to amend may be warranted in particular cases.²⁰⁵ It is troubling, however, that courts appear to apply a *stricter* standard for motions to amend in summary process.²⁰⁶ One explanation for this fact is that courts in summary process cases may view summary process as a limited proceeding without claim preclusive effect, where the opportunity to fully litigate all claims can be sacrificed in order to achieve a speedy determination on the issue of possession.²⁰⁷ Courts in subsequent actions, however, may assume that the summary process case was a comprehensive proceeding that can fairly be given full preclusive effect.²⁰⁸ These inconsistent assumptions are to the detriment of the tenant, whose ability to litigate claims could be consciously circumscribed by the summary process court, only to be treated as exhausted by later courts.

UNIF. SUMM. PROCESS R. 1); *Cambridge Chamber of Commerce v. Cent. Square Ins. Agency, Inc.*, 1999 Mass. App. Div. 27, 31 (App. Div. 1999) (stating motion to amend on day of trial may warrant denial, “particularly” in summary process).

²⁰² *Hodge*, 604 N.E.2d at 1335.

²⁰³ See *id.* at 1335-36 (affirming denial of tenant’s motion to amend counterclaim on day of trial); *GML Corp. v. Massey*, 2007 Mass. App. Div. 143, 144 (App. Div. 2007) (denying tenant’s untimely motion to amend).

²⁰⁴ *Bldg. 42 Assocs. v. Russo*, No. 02-02502 (Hous. Ct. Dep’t. Order June 25, 2002).

²⁰⁵ In *Hodge*, for example, the tenant was represented by counsel and the long, tortuous history of the case led the court to conclude that the tenant had “attempted to manipulate the summary process procedure and ha[d] misused statutory and regulatory protections for tenants in rental housing.” 604 N.E.2d at 1336.

²⁰⁶ Compare *Castellucci v. U. S. Fidelity & Guar. Co.*, 361 N.E.2d 1264, 1265 (Mass. 1977) (describing “expressed tendency . . . in favor of allowing amendments” in general civil practice), with *Hodge v. Klug*, 604 N.E.2d 1329, 1335 (Mass. App. Ct. 1992) (stating this “liberal attitude” is “tempered” in summary process).

²⁰⁷ See *supra* note 192 (observing housing court cases expressing view summary process does not have claim preclusive effect); see also *Boston Hous. Auth. v. O’Hannisian*, No. 06-SP-031789, slip op. at 2-3 (Hous. Ct. Dep’t Order Apr. 6, 2007) (severing tenant’s counterclaims lest they “distract the jury from the central issues to be decided”); *CMJ v. Stallworth*, No. 98-04095, slip op. at 1-2 (Hous. Ct. Dep’t Order Sept. 8, 1998) (granting plaintiff’s motion to strike counterclaim because it would distract from the central issue). But see *Lakewood Village, LLC v. Connors*, No. 06-SP-031789, slip op. at 1 (Hous. Ct. Dep’t Order March 23, 2005) (allowing tenant claims despite recognizing “landlord’s right to expeditious determination of the summary process case”).

²⁰⁸ See *supra* notes 90-130 and accompanying text (reviewing recent Massachusetts cases in which summary process proceedings were given claim preclusive effect).

2. Motions to Dismiss or Sever Counterclaims

Even assuming a tenant is able to raise all valid counterclaims in a summary process answer, these claims still face an additional danger: dismissal or severance. Courts retain discretion to dismiss or sever counterclaims “which cannot appropriately be heard as part of the summary process action.”²⁰⁹ Under either procedure, the tenant is forced to litigate his or her counterclaims in a separate forum.²¹⁰ Dismissal is more burdensome than severance, however, because the tenant must take the additional steps of initiating the second action.²¹¹ For indigent tenants, severance or dismissal may well mean the end of the road for their claims. Many tenants lack both the expertise and resources to successfully pursue a separate action in small claims court without representation.²¹² At the same time, free legal services providers may be unwilling to dedicate their scarce attorney power to such affirmative suits.²¹³ Therefore, keeping counterclaims within the summary process case is essential to ensuring that tenants may fully litigate their claims.

In order to understand how courts generally exercise their discretion in this area, it is helpful to begin with the full text from the commentary to Rule 5 upon which they rely:

Because counterclaims are not compulsory, the court retains discretion to sever a counterclaim which cannot

²⁰⁹ Commentary to MASS. UNIF. SUMM. PROCESS R. 5.

²¹⁰ See MASS. R. CIV. P. 41 (b) (3) and (c) (providing for dismissal of counterclaim without prejudice on the basis of improper venue); MASS. R. CIV. P. 42 (b) and (c) (providing for separate trial of severed claims).

²¹¹ See *Akers v. Hall*, No. 06-0202, slip op. at 2 (Hous. Ct. Dep’t Order June 28, 2006) (Abrashkin, J.). The housing court judge in *Akers* recently explained his preference for severance over dismissal:

It appears to me that judicial and administrative economy will be served by severing, rather than dismissing, the tenant’s counterclaims from the case in chief Those counterclaims can then be tried separately under Mass.R.Civ.P. 42(b). This approach will not prejudice the landlord-his right to a clean and prompt up-or-down determination on cause will be preserved. The court intends this order to establish the functional equivalent of a separate civil action on the tenant’s counterclaims, and only seeks to avoid the additional time, expense, and duplicated paperwork involved in commencing and managing such a separate action.

Id.

²¹² See Russell Engler, *Ethics in Transition: Unrepresented Litigants and the Changing Judicial Role*, 22 NOTRE DAME J.L. ETHICS & PUB. POL’Y 367, 384-85 (2008) (describing the significant limitations facing *pro se* litigants as “beyond dispute”).

²¹³ See POWELL, *supra* note 186, at 9 (stating “housing cases are high on the list of unmet legal needs”).

appropriately be heard as part of the summary process action. It would, however, appear to be contrary to the law to sever a counterclaim which is being relied upon as a defense under G.L. c. 239, § 8A.²¹⁴

The first clause, which qualifies all of the court's discretion, merits emphasis: "Because counterclaims are not compulsory."²¹⁵ The court in *Marrotto v. Naumann*²¹⁶ articulated the logical relationship between dismissal or severance and the permissive nature of the counterclaim.²¹⁷ In affirming dismissal of counterclaims improperly raised in a summary process proceeding, the court explained that the tenant would not be prejudiced because the claims were permissive under Rule 5.²¹⁸ The tenant therefore "remain[ed] free to pursue counterclaims in a separate suit."²¹⁹

Courts in summary process cases are aware that Rule 5 governs their discretion to sever or dismiss counterclaims.²²⁰ They also appear to assume that Rule 5 is the end of the story because it classifies all counterclaims as permissive and its commentary suggests that all counterclaims as severable unless raised as a defense under section 8A.²²¹ For example, courts typically sever or dismiss counterclaims raised in for cause evictions where section 8A defenses are not applicable.²²² However, Rule 5 is *not* the end of the story because in spite of Rule 5, a court in a subsequent action may find certain of a tenant's counterclaims to have been compulsory.²²³ Therefore, courts adjudicating a summary process case

²¹⁴ Commentary to MASS. UNIF. SUMM. PROCESS R. 5.

²¹⁵ *Id.*

²¹⁶ 1999 Mass. App. Div. 35 (App. Div. 1999).

²¹⁷ *Id.* at 37 n.4.

²¹⁸ *Id.*

²¹⁹ *Id.*

²²⁰ See, e.g., *Clarendon Residences, LLC v. Zand*, No. 07H84SP000817, slip op. at 5 (Hous. Ct. Dep't Order Dec. 7, 2007) (citing Rule 5); *Akers v. Hall*, No. 06-SP-0202 (Hous. Ct. Dep't Order June 28, 2006) (same); *Ednson Realty Trust v. Robinson*, No. 88-SP-7252-C, slip op. at 5 (Hous. Ct. Dep't Order Nov. 21, 1988) (same).

²²¹ See MASS. UNIF. SUMM. PROCESS R. 5 ("Counterclaims shall not be considered compulsory . . ."); MASS. UNIF. SUMM. PROCESS R. 5 cmt. ("Because counterclaims are not compulsory, the court retains discretion to sever a counterclaim which cannot appropriately be heard as part of the summary process action. It would, however, appear to be contrary to the law to sever a counterclaim which is being relied upon as a defense under G.L. c. 239, § 8A.").

²²² See, e.g., *Beacon Residential Mgmt. v. Spitzer*, No. 07-01101, slip op. at 2 (Hous. Ct. Dep't Order Apr. 6, 2007) (reasoning that counterclaims would "distract from the central issues to be decided" in the case); *Sylvestre v. Harris*, No. 06-1053 (Hous. Ct. Dep't Order Apr. 27, 2006) (dismissing counterclaims that are readily separable from rest of case); *Urban Edge Property Mgmt. v. Garcia-Perez*, No. 05-02436, slip op. at 2-3 (Hous. Ct. Dep't Order Sept. 13, 2005) (dismissing counterclaims as they would require additional proof at trial).

²²³ See *supra* notes 90-130 and accompanying text (reviewing Massachusetts cases in which

should take a more restrained approach towards severance and dismissal of counterclaims, consistent with the treatment of compulsory counterclaims in other contexts.²²⁴

This problem with dismissal and severance presents yet another example of how misguided reliance on Rule 5 in contemporary legal practice disadvantages tenants. Overall, there is a dramatic and troubling disconnect between the attitude of the legal community in summary process proceedings and the actual treatment of tenants in subsequent actions. In summary process, counterclaims are assumed to be permissive, and thus lawyers do not counsel their clients to raise all claims arising out of the tenancy.²²⁵ At the same time, as this section illustrates, courts are more likely to frustrate tenants' attempts to pursue those claims by denying motions to amend and by dismissing or severing counterclaims. By contrast, in subsequent actions, counterclaims are assumed to have been compulsory and the summary process proceeding is treated as a full, fair and final opportunity to litigate claims between the parties.²²⁶ Consequently, basic claim preclusion principles bar tenants attempting to raise new counterclaims.²²⁷ The net effect of this confusion is that tenants may never have the opportunity to litigate potentially valid claims against their landlords in any forum. This outcome cannot have been an intended result of either the statutory summary process procedure or claim preclusion doctrine.

V. PRACTICAL RECOMMENDATIONS FOR TENANT ATTORNEYS

There is ample room for disagreement over the proper interpretation of Rule 5, as well as the broader policy question of how

tenant claims were precluded because compulsory in prior summary process proceeding).

²²⁴ See, e.g., *Trenz v. Family Dollar Stores of Mass., Inc.*, 900 N.E.2d 97, 100 (Mass. App. Ct. 2009) ("Actions such as the present case, involving claims between the same parties that arise out of the same contractual relationship and which could have been raised as claims and counterclaims in a single action, are particularly suitable for consolidation." (citations omitted)); *Kimball v. Liberty Mut. Ins. Co.*, 1999 Mass. App. Div. 298, 299 (App. Div. 1999) (describing limited circumstances under which severance of claims is appropriate).

²²⁵ See *supra* notes 173-187 (noting view among housing court lawyers that not all counterclaims need be raised in summary process).

²²⁶ See *Murray v. Zullo* 20 Mass. L. Rptr. 293, 295 (Super. Ct. 2005) (asserting summary process action was proper proceeding to raise counterclaims); *supra* notes 90-130 and accompanying text (surveying recent cases where summary process proceedings precluded plaintiff tenant's claims).

²²⁷ See *Heacock v. Heacock*, 520 N.E.2d 151, 152-53 (Mass. 1988) ("The doctrine of claim preclusion makes a valid, final judgment conclusive on the parties and their privies, and bars further litigation of all matters that were or should have been adjudicated in the action.") (citing *Franklin v. N. Weymouth Coop. Bank*, 283 Mass. 275, 279-80 (1933)).

claim preclusion and counterclaim practice should be reconciled in summary process.²²⁸ Interesting as these issues may be, they are not of primary concern to the tenants presently involved in summary process proceedings. Focusing on the needs of tenants today, this final section identifies ways tenant attorneys can mitigate, and even capitalize upon, the claim preclusion risks that their clients face in the current legal climate.

A. Best Practices in Summary Process

There are several important steps that tenant attorneys can take – before, during, and after their clients’ summary process cases – to mitigate the negative effects of claim preclusion. Underlying all of these recommendations is the general principle that attorneys must revise their working assumptions. The compulsory counterclaim rule governing ordinary civil practice may apply to summary process proceedings. Therefore, any counterclaims arising out of the tenancy should be assumed to be compulsory absent explicit recognition to the contrary by the court in a particular case. Starting from this premise, attorneys should be properly conscious of the precautions that must be taken in all aspects of their representation.

1. Protecting Clients from the Effects of Claim Preclusion

In litigating summary process cases, tenant attorneys should take all possible steps to ensure that their clients do not inadvertently waive valid legal claims. Although this task may sound daunting, it will, in most circumstances, require only minor adjustments to routine practice. First, attorneys should counsel their clients to raise all counterclaims arising out

²²⁸ One academic review of Ohio law presents compelling doctrinal and policy arguments against applying claim preclusion to any summary process counterclaims. See O’Leary, *supra* note 136, at 72-91. Scholars have also debated for many years the broader question of whether, and to what extent, tenant counterclaims should be available at all in summary process. See generally, Rafael Mares, *Enforcement of the Massachusetts Lead Law and Its Effect on Rental Prices and Abandonment*, 12 J. AFFORDABLE HOUSING & COMMUNITY DEV. L. 343 (2003) (presenting an economic defense of vigorous lead paint law enforcement, including through summary process counterclaims); Lawrence K. Kolodney, *Eviction Free Zones: The Economics of Legal Bricolage in the Fight Against Displacement*, 18 FORDHAM URB. L.J. 507, 509-12 (1991) (arguing for the use of summary process counterclaims to fight gentrification); Richard H. Chused, *Contemporary Dilemmas of the Javins Defense: A Note on the Need for Procedural Reform in Landlord-Tenant Law*, 67 GEO. L.J. 1385, 1390 (1979) (arguing that expansion of summary process counterclaims must be balanced by an equitable procedure for settling possession prior to judgment); Samuel Bassett Abbott, *Housing Policy, Housing Codes and Tenant Remedies: An Integration*, 56 B.U. L. REV. 1, 126-28 (1976) (critiquing the use of summary process counterclaims to enforce housing codes).

of the tenancy in their summary process answers if there is no risk of prejudice from doing so. This step is the easiest and safest way to preserve a tenant's right to litigate all claims. There may be situations, however, in which other practical considerations weigh against raising a particular counterclaim. For example, if a tenant's children have been exposed to lead paint in the apartment, there may not be sufficient time to determine the scope of the resulting harm before the summary process trial.²²⁹ In such cases, the attorney should seek written consent from the opposing party to litigate the lead paint claim separately.²³⁰ Because landlords are generally seeking speedy and inexpensive return to possession, they may not object to such an arrangement.

After properly raising all claims arising out of the tenancy, attorneys should develop clear records regarding any claims thereafter severed or dismissed by the court for reasons of convenience efficiency, or to avoid prejudice.²³¹ Specifically, attorneys should seek an explicit statement from the court that the claims have been dismissed without prejudice, or that the tenant's right to raise the claims in a second action has been reserved.²³² Such express reservations, even if seemingly superfluous at the time, will be extremely valuable in defending against any future assertion of claim preclusion against the tenant.²³³

2. Using the Precedent to a Tenant's Advantage

Tenant attorneys responding to the threat of claim preclusion need not be entirely on the defensive. Claim preclusion can also be used proactively to justify treating tenant counterclaims more generously within the summary process proceeding.²³⁴ In general, tenants will benefit from including counterclaims within the summary process proceeding.²³⁵ In

²²⁹ See BALANDIS ET AL., *supra* note 169, at 227-28 (advising that one wait before raising lead paint claim to allow injury development). Other forms of personal injury attributable to one's landlord could raise similar concerns. *Id.*

²³⁰ Consent from the opposing party is sufficient to defeat any future claim preclusion defense. See *supra* note 184 (discussing the use of consent to avoid claim preclusion). However, an opposing party's mere failure to object, after being notified of one's intention to bring a claim separately, may not be sufficient. *Id.*

²³¹ See *supra* note 222 (identifying instances of housing courts severing or dismissing counterclaims).

²³² See RESTATEMENT (SECOND) OF JUDGMENTS § 26(1)(b) (1982) (listing express reservation as an exception to claim preclusion).

²³³ *Id.*

²³⁴ See *supra* notes 90-130, 206-224 (illustrating how preclusion can justify inclusion of counterclaims in summary process proceedings).

²³⁵ See BALANDIS ET AL., *supra* note 169, at 223 (explaining counterclaims are "important"

evictions for non-payment of rent or without fault, damages awarded on counterclaims can be used as a defense to a landlord's claim for possession.²³⁶ Even when such counterclaims cannot be used as defenses against the landlord's claim for possession, they may still justify an award of money damages against the landlord.²³⁷

Unfortunately, courts may be relatively reluctant to allow tenant counterclaims in summary process proceedings.²³⁸ These courts reason that counterclaims can always be raised in a separate action, and may distract from what is meant to be a streamlined adjudication.²³⁹ Tenant attorneys should urge courts to revise this attitude in light of the recent decisions holding that counterclaims arising out of the tenancy are compulsory in summary process.²⁴⁰ Because these counterclaims are compulsory, courts should treat them as a natural and integral part of the underlying case.²⁴¹ Courts should freely grant motions to amend answers and should reserve severance or dismissal of counterclaims for extreme cases of prejudice or inconvenience.

B. Policy Arguments Against Enforcement of Claim Preclusion in Subsequent Actions

Thus far, the discussion has focused on attorney conduct within summary process itself. However, sensitivity to claim preclusion issues is equally important in litigating subsequent affirmative suits brought by tenants. Landlords in such cases may argue that the tenants' claims are barred because they should have been raised in a prior summary process proceeding. Assuming the court accepts the premise that summary process proceedings can have claim preclusive effect, the tenant's attorney must be

in summary process cases).

²³⁶ See MASS. GEN. LAWS ANN. ch. 239, § 8A para. 5 (2004) ("There shall be no recovery of possession under this chapter if the amount found by the court to be due the landlord equals or is less than the amount found to be due the tenant or occupant by reason of any counterclaim or defense under this section.")

²³⁷ See *Ednson Realty Trust v. Robinson*, No. 88-SP-7252-C, slip op. at 2-5 (Hous. Ct. Dep't Order Nov. 21, 1988) (holding tenant could maintain counterclaim for money damages in fault eviction).

²³⁸ See *supra* notes 206-224 and accompanying text (describing housing courts' treatment of counterclaims)

²³⁹ See *supra* notes 222 (identifying housing courts' reasoning for disallowing counterclaims in summary process).

²⁴⁰ See *supra* notes 90-130 and accompanying text (discussing decisions that have applied claim preclusion to bar tenants from bringing claim in subsequent action).

²⁴¹ See *PGR Mgmt. Co. v. Credle*, 694 N.E.2d 1273, 1276 (Mass. 1998) ("[d]efenses and compulsory counterclaims are part and parcel of the underlying case and are adjudicated as part of that case").

prepared to argue that, under the circumstances of the particular case, claim preclusion should not apply.

Courts recognize an exception to the rule of claim preclusion for cases in which its intended goals of judicial efficiency and fairness would not be served.²⁴² This exception recognizes the possibility that the policy rationale for preclusion may not apply to all cases. More specifically, claim preclusion is designed to alter behavior; the threat of future preclusion incentivizes litigants to raise all their claims at the same time, thereby increasing judicial efficiency and protecting opposing parties from repetitious lawsuits.²⁴³ When, for whatever reason, the threat of claim preclusion cannot successfully alter behavior, application of the doctrine is inappropriate.²⁴⁴ The circumstances of summary process proceedings explained below provide strong grounds for concluding that the threat of claim preclusion will not have its intended effect on future litigants.²⁴⁵ This result justifies treating summary process as an exception, and declining to enforce claim preclusion against tenants.

First, the uncertainty caused by Summary Process Rule 5 concerning the preclusive effect of summary process proceedings undermines the potential for court enforcement to alter behavior.²⁴⁶ Because attorneys and their clients are relying on Rule 5 to protect them from the effects of claim preclusion, they are generally not incentivized to raise all their claims in summary process proceedings. A single trial court's decision to enforce claim preclusion will not alter this attitude, which is the result of ambiguous procedural rules and conflicting appellate court decisions. Thus, applying claim preclusion against an individual tenant will have a purely punitive effect, without altering future behavior.

Second, the relatively informal nature of summary process proceedings also undermines the value of enforcement. Most tenants are

²⁴² See *Gloucester Marine Rys. Corp. v. Charles Parisi, Inc.*, 631 N.E.2d 1021, 1025 (Mass. App. Ct. 1994) ("Since claim preclusion is grounded upon considerations of fairness and efficient judicial administration, the doctrine is not applied rigidly where such interests would not be served." (citation omitted)).

²⁴³ See *supra* notes 6-10 and accompanying text (describing the policy behind preclusion doctrine).

²⁴⁴ See *Aspinall v. Philip Morris Cos.*, 813 N.E.2d 476, 489 n.19 (Mass. 2004) (stating preclusion policies would not be furthered by precluding class members' personal injury claims); *Tinkham v. Jenny Craig, Inc.*, 699 N.E.2d 1255, 1258 (Mass. App. Ct. 1998) (declining to find preclusion where claim splitting was partially attributable to adversary's "misleading procedural sparring").

²⁴⁵ See *infra* notes 246-251 and accompanying text.

²⁴⁶ See *supra* notes 173-224 and accompanying text (discussing uncertainty surrounding Rule 5).

not represented in summary process.²⁴⁷ Even when a tenant is represented, the entire trial schedule is highly expedited. Answers to summary process complaints are due within one week²⁴⁸ and discovery prior to trial is ordinarily restricted to two weeks.²⁴⁹ Furthermore, according to at least one observer of the Boston Housing Court summary process docket, “the judges often fail to develop a full and fair record, assist the unrepresented litigant on procedure and questions of law, or conduct the trial in a manner best suited to discover the facts and do justice in the case.”²⁵⁰ The lack of representation and prioritization of speed in summary process may prevent tenants from successfully raising and litigating their counterclaims.²⁵¹ Because it cannot remedy these structural limitations, the threat of claim preclusion will not incentivize tenants to raise counterclaims in summary process; it will merely punish tenants for a result they were unable to avoid.

The two arguments outlined above illustrate the ways in which summary process proceedings do not fit comfortably into the claim preclusion model. This is an important point to make, even if the court has concluded that the procedural rules do not prevent it from giving summary process proceedings preclusive effect. Claim preclusion is not a doctrine to be applied mechanically; it is a policy tool, and therefore a tenant attorney will do well to focus the court’s attention on the fact that enforcing claim preclusion against tenants is likely to do far more harm than good.

VI. CONCLUSION

Several important principles emerge from the preceding review of summary process law and practice in Massachusetts. As an initial matter, Massachusetts lacks a settled legal standard for the effect of claim preclusion on summary process counterclaims. At least some courts have held that claim preclusion does apply, although its precise scope continues to develop on a case-by-case basis. Furthermore, the current state of the law has significant potential to prejudice tenants subject to eviction. Lack of accurate information among lawyers and judges in summary process cases has resulted in a set of common practices that are insufficiently sensitive to the threat of claim preclusion. Courts have also proved

²⁴⁷ See POWELL, *supra* note 186, at 9.

²⁴⁸ MASS. UNIF. SUMM. PROCESS R. 3.

²⁴⁹ MASS. UNIF. SUMM. PROCESS R. 7.

²⁵⁰ Russell Engler, *And Justice for All – Including the Unrepresented Poor: Revisiting the Roles of the Judges, Mediators, and Clerks*, 67 FORDHAM L. REV. 1987, 2061 (1999) (citation omitted).

²⁵¹ See O’Leary, *supra* note 136, at 74-75 (describing difficulty of litigating counterclaims in summary process).

unwilling to temper the force of claim preclusion in light of the relatively informal nature of summary process proceedings, and the unique interests it is designed to protect.

Tenants and their representatives are not defenseless, however, against this troubling trend in summary process law. The first step to adequate protection is internalization. The working assumption should be that all counterclaims arising out of the tenancy are subject to preclusion if not raised in summary process. Although this assumption may lead to some greater inconvenience within the summary process case, it is well worth the protection it will afford the tenant in any subsequent action. The second, and admittedly more difficult, step is to make courts aware of the problems with transposing traditional claim preclusion principles into summary process. The unique situation of a tenant attempting to avoid eviction cannot be equated to the average civil litigant. Awareness of this difference may persuade courts to exercise more leniency in applying claim preclusion principles in this context.

Admittedly, this article has not addressed the most effective solution to the problem of claim preclusion in summary process: legislative reform. This omission is not meant to suggest that legislative reform is either unwarranted or infeasible. Rather, it merely acknowledges the fact that any legislative solution will be too late to protect the tenants who are defending against evictions in housing court today. These tenants need protection from the very immediate threat of forfeiting valid legal claims. Such protection can only come from the kind of careful litigation strategies and arguments suggested in this article. Ideally, adoption of these practices will ensure that tenants do not become the unwitting victims of an inconspicuously set, yet potentially fatal, procedural trap.