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Rule 15: Amended and Supplemental Pleadings

Key Concepts

- Amending pleadings once as a matter of course and thereafter obtaining permission
- Amending pleadings after the statute of limitations has run
- Amending pleadings during or after the trial
- Supplementing pleadings

Introduction

Rule 15 allows a party to amend its pleading after it has been filed with the court. In keeping with the flexibility of the federal rules, Rule 15 is generous. The policy is that by allowing the parties to "fix" their pleadings as they go along, the merits of the case will more readily be resolved. The parties will not waste precious time and resources squabbling over the mechanics of amending their pleadings. However, Rule 15's flexibility must also be balanced with fairness concerns for the opposing party.

The need to amend generally arises when a party has made an inadvertent omission or mistake in its pleading. In that case, if the party realizes its mistake fairly quickly, the amendment will generally be allowed under the rule. But, a party may also learn of new information and want to amend its pleading to add a new party or claim accordingly. Whether an amendment is allowed in that situation often turns on whether the statute of limitations for the underlying action has run. If it has, the rule requires more complex analysis to determine whether the amendment will be allowed. If it does, the new pleading will "relate back" to the original date of filing.

A. The Rule

Rule 15 has four main sections:

- The first section (15(a)) sets out when and how a party can amend its pleading before trial;
- The second section (15(b)) allows the parties to amend the pleadings during and after trial;
- The third section (15(c)) prescribes when a party can amend to add a new claim or party even after the statute of limitations has run;
- Finally, the fourth section (15(d)) explains when a party can add claims that arise out of an event that occurred after the original pleading was filed.

The **statute of limitations** is the amount of time in which a particular cause of action can be brought. *See* Chapter 1 for a detailed description.

B. Rule 15(a): Amendments Before Trial

Rule 15(a) addresses two issues:

- the one and only time a party can amend the complaint without the permission of either the court or the opposing party; and
- how a party can amend a pleading once it has already filed an amendment under Rule 15(a)(1) or if the time period for filing a Rule 15(a) amendment has passed.

The Rule — Rule 15(a)

Amendments Before Trial

(1) *Amending as a Matter of Course*. A party may amend its pleading **once as a matter of course** within:

(A) 21 days after serving it; or

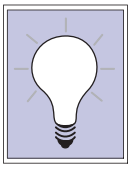
(B) if the pleading is one to which a responsive pleading is required, 21 days after service of a responsive pleading or 21 days after

service of a motion under Rule 12(b), (e), or (f), whichever is earlier.

(2) *Other Amendments*. **In all other cases**, a party may amend its pleading only with the **opposing party's written consent** or the **court's leave**. The court should freely give leave **when justice so requires**.

EXPLANATION

1. Rule 15(a)(1): Amendments as a Matter of Course



A party wishing to amend its pleading without permission of the court or the opposing party has a limited time in which to do so. This is called amending as a "matter of course" or an amendment "as of right." There are three specific moments listed in Rule 15(a)(1) in which a party can amend its pleading. They are:

(a) within 21 days of serving the pleading;

(b) 21 days after a responsive pleading is served; or

(c) 21 days after a Rule 12 motion is served.

Remember Rule 7 (discussed in chapter 7). It tells us what counts as a "pleading" and what counts as a "motion." It is important to understand that while there are three distinct "amendment moments," a party has the right to amend without permission only once. For example, if a party amends its pleading within 21 days of serving that pleading, it cannot use Rule 15(a)(1) to amend again. Instead, it must seek permission of the court or the opposing party under Rule 15(a)(2).

EXAMPLES & ANALYSIS

EXAMPLE: Paula filed her complaint against Devon on October 1. She alleged that he negligently ran over her toe with his scooter. Devon did not file an answer, but instead filed and served a Rule 12(b)(6) motion to dismiss on October 11, arguing that Paula failed

to state a claim upon which relief could be granted. In the meantime, Paula realized that she also wanted to state a claim against Devon's brother Dillon. She alleges that right after Devon ran over her right toe, Dillon ran over her left one. She would like to file an amended complaint to add Dillon. The statute of limitations does not run for two more years.

Analysis: Paula has 21 days from the date of filing of Devon's 12(b)(6) motion to file her amended complaint under 15(a)(1). This means that she has to file the complaint adding Dillon as a party by November 1. If she misses that deadline, she will not be able to file the amendment as a matter of course under Rule 15(a)(1).

IN PRACTICE

If a plaintiff files an amended complaint under Rule 15(a)(1) while a motion to dismiss is pending, the court has discretion to "transfer" the motion to the new complaint (assuming the motion is still responsive to the amended complaint) or it can require the defendant to file a new motion (if, for example, resolving the motion in light of the new complaint would cause confusion or delay).

EXAMPLE: Assume that Paula successfully amended her complaint before November 1 to add Dillon as party. Dillon filed his answer on November 15, but a few days later he realized that he mistakenly denied an allegation when he intended to admit it. He filed an amended answer on November 20. Is he allowed to do so without court permission or without Paula's consent?

Analysis: Yes. The answer is a pleading, so Rule 15(a)(1)(A) applies. Dillon has 21 days from serving his answer to amend. And, as a policy matter, this makes sense. His mistake is ministerial and the sooner it is fixed, the better it is for all parties involved.

EXAMPLE: Assume again that Paula successfully amended her complaint before November 1 to add Dillon as a party. After filing that amendment, Paula realized that she mistakenly listed the wrong street names when describing where the accident occurred. Can she amend her pleading without permission from the court or the opposing party in order to replace the wrong street names with the correct ones?

Analysis: No. Paula has already amended her complaint once as a matter of course under Rule 15(a)(1). Although her proposed amendment is fairly innocuous, she will have to seek permission to amend under Rule 15(a)(2).

2. Rule 15(a)(2): Amendments by Party Consent or Court Approval

Like Rule 15(a)(1), Rule 15(a)(2) is a generous rule. Even when the amending party has already amended once under Rule 15(a)(1) (or missed the window to amend under the same), that party can still amend its pleading as long as the opposing party consents in writing or the court grants the party leave to amend.

With respect to the first option—obtaining written consent from the opposing party—the calculus is fairly straightforward. The attorney for the opposing party should generally agree to the amendment unless doing so would violate the duties owed to her client. In other words, most reasonable requests for written consent for an amendment will be given. The attorney for the opposing party will in all likelihood want to avoid a protracted battle before the judge over a potential amendment and will often just allow the amendment out of professional courtesy.

On appeal, the court's decision to deny the request for an amendment is reviewed for abuse of discretion. *See* Chapter 19 for a discussion of standards of review. If the court fails to explain why it denied the request, that omission alone could qualify as an abuse of discretion.

However, if the opposing party will not consent, the amending party must ask for the court's approval. Such a request should be made by motion, with the proposed amendment attached.

The language of Rule 15(a)(2) states that the amendment should be allowed "when justice so requires." Most courts have in-

terpreted this language to require them to allow an amendment unless one of the following justifies denial:

(a) undue delay;

(b) bad faith or dilatory motive by the moving party;

(c) repeated failure to cure deficiencies by previous amendments;

(d) undue prejudice to the opposing party; or

(e) futility.

See *Foman v. Davis*, 371 U.S. 178, 192 (1962) (providing this basic set of factors for denying an amendment).

EXAMPLES & ANALYSIS

EXAMPLE: Parachute Corp. filed a complaint against Drexel Corp. in a breach of contract claim two years ago. In the past two years, the parties have completed a significant amount of discovery. The parties are set to go to trial in a month, but Parachute Corp. has asked to amend its complaint to add an additional claim of tortious interference. Drexel Corp. refused to consent to the amendment, so Parachute Corp. has sought permission from the court. Should the court allow the amendment?

Analysis: It depends, but probably not. The court will likely find that amending a month before trial to add this additional claim would result in prejudice to Drexel Corp. The court will have to determine whether Drexel Corp. would have done anything differently over the past two years. In other words, would it have conducted different discovery had it known of the tortious interference claim? If not, then the court may not find prejudice. But, if so, then the court will likely deny the amendment. The court will also have to consider whether the new claim added by the amendment would be futile. Or put a different way, the court will have to determine whether the tortious interference claim would survive a 12(b)(6) motion to dismiss. If it would not, then the court could deny the amendment on the basis of futility.

Rule 15(a)(2) does not prescribe a deadline for requesting permission from the court to amend the pleading. But, the factors to be considered certainly become more pronounced as time wears on. If a request to amend is made early in the litigation process, it is more difficult for a court to determine that the party was dilatory or that there was undue delay. However, if the request is made later in the process, the court may have a harder time avoiding that conclusion.

While the denial of the request for amendment is reviewed for abuse of discretion on appeal, a finding that the amendment would have been futile is a legal conclusion that is subject to de novo review. *See* Chapter 19 for a discussion of standards of review.

It is worth pointing out, however, that just because an amendment will be bad for the opposing party on the merits—meaning, an amendment adding a meritorious claim might be harder for a defendant to disprove—it does not mean that the court should not grant leave to amend. Rule 15(a)(2)'s requirement of justice is just that. As long as the proposed amendment does not prejudice the opposing party's preparation, it should be allowed.

IN PRACTICE

While Rule 15(a)(2) does not contain a time limit on amendments to the pleading, the court's scheduling order under Rule 16(b) might. If a party attempts to amend its pleading after the deadline in a Rule 16(b) scheduling order has run, then the party must meet the requirements of both Rule 15(a)(2) and Rule 16(b)(4) (requiring good cause and the judge's consent to modify a Rule 16(b) scheduling order). *See* Chapter 11 for a discussion of scheduling orders.

C. Rule 15(b): Amendments During and After Trial

Rule 15(b) addresses amendments to the pleading during and after trial. Remember that up to now, we have only been looking at when and how pleadings might be amended before trial. With Rule 15(b), the rule addresses what to do when an issue that was not explicitly covered in the pleading is brought up at trial. This can happen in two situations. First, when the issue comes up in trial and the opposing party objects to allowing an amendment to the pleading. Second, when the issue is litigated in trial and neither party has objected to it. In the first situation, the court must determine whether the opposing party would suffer prejudice from adding the issue at that time. In the second, the parties and the court will treat the issue as if it had been properly pled from the beginning. However, a party may move to formally amend the pleading to "conform to the evidence."

The Rule — Rule 15(b)

Amendments During and After Trial

(1) Based on an Objection at Trial. If, at trial, a party objects that evidence is not within the issues raised in the pleadings, the court may permit the pleadings to be amended. The court **should freely permit an amendment** when doing so will aid in presenting the merits and the objecting party fails to satisfy the court that **the evidence would prejudice that party's action or defense on the merits.** The court may grant a continuance to enable the objecting party to meet the evidence.

(2) For Issues Tried by Consent. When an issue not raised by the pleadings **is tried by the parties' express or implied consent,** it must be treated in all respects as if raised in the pleadings. A party may move—at any time, even after judgment—**to amend the pleadings to conform** them to the evidence and to raise an unpleaded issue. But failure to amend does not affect the result of the trial of that issue.

EXAMPLES & ANALYSIS

EXAMPLE: Pierre attended a baseball game at Danger Field, home of the Dangers. At the game, Pierre decided to check the scores of the other games being played that day on his phone. Unfortunately, while Pierre was looking at his phone, Sam Slugger (a star player for the Dangers) hit a foul ball that hit Pierre in the face. Pierre decided to sue Danger Field for negligently failing to have a net to stop foul balls from going into the stands. He did not include any other claims in his complaint.

At trial, Pierre tried to introduce evidence that a Danger Field security guard told Pierre that he was an idiot for checking his phone during an at-bat. Danger Field objected, arguing that the statement was not within the original claim and that introducing the statement into evidence would prejudice its defense. Pierre moved to amend his complaint to include a claim of intentional infliction of emotional distress. How should the judge rule?

Analysis: It is likely that a court would find that the security guard's statement will aid in Pierre's presentation of the merits of both claims. However, it is also likely that introducing this evidence would prejudice Danger Field's defense. The evidence was only introduced at trial, and Danger Field hasn't had an opportunity to investigate the alleged statement. It would also be difficult for Danger Field to adequately defend against the new claim of intentional infliction of emotional distress. If the court believes the claim should be added, however, it can lessen the prejudice that Danger Field might suffer by granting a continuance to give it more time to prepare.

EXAMPLE: Polly the Popstar wanted to film a music video for her new hit song, "I'm Rich." For the video, Polly rented very expensive jewelry from Dane the Jeweler. Unfortunately, while Polly was wearing the jewelry, she was robbed at gun point. Dane sued Polly alleging negligence in her complaint.

Before trial, Dane filed a brief with the court alleging that Polly also could be found liable for a breach of contract claim because Polly

was contractually bound to return the jewelry. She did not amend the complaint at that time; it still only alleged negligence. Polly filed a response brief with the court, saying that she had no such duty to return the jewelry under the contract, and even if she did, she was excused from performance because of the extenuating circumstances. The trial ensued, and Polly was found liable for only the breach of contract claim. After the trial, Dane moved to amend her complaint to include the breach of contract claim. Should the court allow Dane to do so?

Analysis: Dane would be permitted to amend her complaint. By responding to Dane's brief with arguments disputing her breach of contract theory of liability, Polly impliedly consented to litigate that issue. Polly treated the breach of contract claim as if it was in the complaint. Assuming the court found that the issue was tried by implied consent, it must treat the issue as having been raised in the pleading under Rule 15(b)(2). Thus, Dane may amend her complaint to conform to the evidence that was presented in trial and raise the unpleaded breach of contract issue. Even if the court does not formally allow the amendment, however, Rule 15(b)(2) ensures that such failure to amend will not affect the results of the trial.

D. Rule 15(c): Relation Back of Amendments

This rule comes into play when a party wants to add either a new claim or a new party to a pleading, but the statute of limitations has run. It is key to remember that this rule only arises when the statute of limitations has expired. If a party is trying to amend a pleading and the statute of limitations on the action has not yet run, then the party should use only Rule 15(a) or (b) as discussed above.

Rule 15(c) often creates confusion for courts and students alike. But, it need not be that way. In short, Rule 15(c) creates a legal fiction. If a party satisfies the rule,

When a party seeks to amend his pleadings and wants the amendment to relate back, he technically makes the request under Rule 15(a)(2)—he seeks the consent of the court to amend the pleadings. He also uses Rule 15(c) to argue that the amendment is allowed because it relates back under that rule. In other words, the court will only consent to the amendment under Rule 15(a)(2) if it relates back under Rule 15(c). The same is true for amendments under Rule 15(a)(1), although that situation is less common.

then a new party or claim is added to the complaint. The court and the parties act as if the new party or claim has been there since the date the pleading was originally filed and thus before the statute of limitations ran. That is why the amendment is said to "relate back." Because such a legal fiction could potentially be unfair to either the existing parties (if a new claim is added) or to the new party (if she has just been added), the rule is drafted to have a fairly narrow application.

The rule itself consists of three main sections: (1) a section that defers to the relation back provisions of the substantive law being used if they are more generous than the federal rule; (2) a section that explains how a new claim can be added; and (3) a section that explains how a claim against a new party can be added.

THE RULE **Rule 15(c)(1)(A)**

Relation Back of Amendments

(1) ***When an Amendment Relates Back.*** An amendment to a pleading relates back to the date of the original pleading when:

(A) the law that provides the applicable statute of limitations allows relation back; . . .

1. Relation Back Under the Applicable Law's Statute of Limitations

The first section is often overlooked by attorneys. It allows the party to use the relation-back provisions of the substantive law. This means, for example, that if the underlying limitations rule allows for relation back of an amendment that is more generous than Rules 15(c)(1)(B) or (C), then the party can use that state law to amend her pleading and relate her new claim back to the original date of filing. This, of course, only applies if the applicable law of the state includes a provision that governs relation back.

2. Relation Back When Adding a Claim

THE RULE — Rule 15(c)(1)(B)

Relation Back of Amendments

(1) *When an Amendment Relates Back*. An amendment to a pleading relates back to the date of the original pleading when: . . .

(B) the amendment asserts a claim or defense that arose out of the **conduct, transaction, or occurrence** set out—or attempted to be set out—in the original pleading; or . . . .

Assuming that the applicable substantive law does not provide a more generous relation-back provision, the rule then provides for two different tests depending on whether the amending party is adding a new claim against an existing party or whether the amending party is adding a whole new party to the action. In the first instance—adding a new claim against an existing party—the rule requires that the new claim arise out of the same "conduct, transaction, or occurrence" that gave rise to the claims in the original pleading. The policy behind this language is that if the opposing party had notice of the facts that gave rise to a new claim, she would not suffer prejudice if that claim were added.

The terminology "**transaction or occurrence**" might sound familiar. For instance, a version of this language appeared in Chapter 1 discussing supplemental jurisdiction. While the meaning is not exactly the same in all of these contexts, it is fairly similar. Where this language is found in a rule (or case law setting forth doctrine), courts will make similar inquiries such as whether the parties and evidence are the same.

EXAMPLES & ANALYSIS

EXAMPLE: Mr. Pond worked as an industrial engineer for Dooly Inc. for over thirty years. Pond was shocked last year when he was terminated by the company. The Dooly executive who terminated

Pond explained that due to some restructuring within the company, there were no longer any positions for which Pond was qualified. Pond was sorely disappointed and filed suit against Dooly in federal court. In his complaint, he alleged that he had been terminated in violation of the Age Discrimination in Employment Act. His factual allegations explained that he was terminated solely because he was over 50 years of age, not because he was unqualified for any positions in the company. Two years after filing his complaint, Pond sought leave to amend his complaint to add a tort claim. He alleged that in the ten years leading up to his termination, he had eaten lunch daily in the Dooly Inc. cafeteria. He alleged that he developed food allergies from the spoiled food he ate there. There is a two-year statute of limitations on a tort claim, and that time has passed. Can Pond amend his complaint to add this claim and will it relate back?

Analysis: Probably not. Rule 15(c)(1)(B) requires that the new claim arise out of the same conduct, transaction or occurrence set out in the original pleading. Here, Pond only originally alleged that he was terminated because of his age. In essence, that allegation covered only the day he was actually terminated. There were no allegations made about the time leading up to his termination when the allegedly defective food was served. From the perspective of Dooly, it would not have been on notice of this potential tort claim from the allegations supporting Pond's age discrimination claims. The alleged tort occurred at different times and involved different transactions and occurrences than the alleged act of age discrimination. So, it is unlikely that a court would find that the tort claim arose out of the same conduct, transaction, or occurrence as the age discrimination claim. This amendment would probably not relate back, so his request to amend would be denied.

3. Relation Back When Adding a Party

THE RULE **Rule 15(c)(1)(C)**

Relation Back of Amendments

(1) When an Amendment Relates Back. An amendment to a pleading relates back to the date of the original pleading when: …

> **(C)** the amendment **changes the party or the naming of the party** against whom a claim is asserted, if **Rule 15(c)(1)(B) is satisfied** and if, **within the period provided by Rule 4(m)** for serving the summons and complaint, the party to be brought in by amendment:
>
> **(i)** received such notice of the action that it will **not be prejudiced** in defending on the merits; and
>
> **(ii)** **knew or should have known** that the action would have been brought against it, **but for a mistake** concerning the proper party's identity.

Statutes of limitations exist to provide a potential defendant with "repose," meaning that after a certain amount a time that individual should be able to get on with her life and not worry about being sued. This policy clashes a bit with the liberality of amending pleadings under the federal rules. In the section governing how new parties are added, the rule attempts to strike a balance between these two policies. The new party can only be added when three distinct requirements are met.

Under **Rule 4(m)**, the plaintiff generally has 120 days from the date of filing the complaint to serve the summons, although that time is subject to extension at the discretion of the court. Any extension granted in a particular case will apply to how Rule 15(c) is applied to a new defendant. In other words, if existing defendants in the action received notice within 150 days because the court granted an extension under Rule 4(m), then a new defendant's window of notice will similarly be 150 days under Rule 15(c).

- First, the new claim must arise out of the same conduct, transaction or occurrence as set out in the original pleading.

- Second, the new party must have received notice of the action such that it would not suffer prejudice in defending against that claim. This notice must have been received within the period provided under Rule 4(m) for serving the summons and complaint.

- Finally, the new party must have known (or should have known) that it would have been named as a defendant in the suit were it not for a mistake. All of these requirements combine to make it difficult to add a new party when doing so would be unfair.

EXAMPLES & ANALYSIS

EXAMPLE: Louise Shaffer was appointed to the position of Secretary of Labor by the President. She was a former executive at Pestin Construction, a large construction company in the state of New Jersey. While Shaffer awaited Senate confirmation of her appointment, Dollars Magazine ran a scathing article about her qualifications. In that same article, the author insinuated that both Shaffer and Pestin Construction had links to organized crime. Company president George Pestin was outraged at this article, but he did not act immediately to respond. He eventually decided that he wanted to take action, however, so ten days before the statute of limitations ran on his alleged libel claim, he filed a complaint against Dollars Magazine. The complaint listed Dollars Magazine as the defendant, with its principal place of business in the Dime and Nickel Building in New York. The summons and complaint were served on Dime, Inc.'s registered agent within 120 days of filing the complaint under Rule 4(m). Pestin quickly discovered, however, that he had sued the wrong entity. Dollars was only a trademark of Dime, Inc.—it was not a separate entity. In order for the suit to go forward, Pestin needed to sue Dime, Inc. However, the statute of limitations for the libel action had already run by the time he made this discovery.

Consider the requirements of Rule 15(c)(1)(C). Does the libel claim against Dime Inc. arise out of the same conduct, transaction, or occurrence that was set out in the original complaint?

Analysis: Yes. The libel action is the same. The only thing that is changing is that a new party is being added. Thus, the first requirement of relating back an amendment when adding a new party is met.

EXAMPLE: Did Dime, Inc. receive notice of the action within the 120-day period set out in Rule 4(m) such that it will not suffer prejudice in defending on the merits?

Analysis: Yes. Its registered agent received a copy of the complaint and summons within the 120-day period set out in Rule 4(m). Thus, it received notice and would not suffer prejudice in defending against the action. It is worth noting, however, that there are limited factual situations where a new party would have had the notice required under this part of the rule. The notice must be from the complaint itself. It cannot be met by general knowledge about a suit gleaned from a newspaper article or from a passing conversation. The complaint itself must have been actually seen or such knowledge must be imputed. What this means in practice is that there is a narrow category of situations where the notice requirement will be met. The first is where the party that was properly served with the complaint and the proposed new party share an "identity of interest," meaning generally that the parties are so related in their business interests that they are essentially one in the same. A parent and its wholly-owned subsidiary are often found to share an identity of interest. The second is when the parties share an attorney. In some situations, the knowledge of the complaint will be imputed to the new party if two parties share legal counsel.

EXAMPLE: Should Dime, Inc. have known that but for a mistake it would have been named as a defendant?

Analysis: Probably yes. It knew that Dollars was its trademark, and from the allegations in the complaint, it was clear that Pestin intended to sue Dime for libel. In other words, Dime knew or should have known that Pestin meant to sue it, especially since it knew that Dollars was not an entity against which one could file suit. It is not as if Pestin knew that both Dime, Inc. and Dollars were entities and chose strategically to sue one

In the actual case upon which this illustration is modeled, relation back of amendment was not permitted. See *Schiavone v. Fortune*, 477 U.S. 21 (1986). This is because Rule 15(c) was differently worded at the time of *Schiavone*. Perception that the actual *Schiavone* result was unjust fueled reconsideration of the Rule, which was changed pursuant to the procedures set forth in the Rules Enabling Act—28 U.S.C. § 2072). (*See* Unit Overview, discussing the rulemaking process).

over the other. That would not be a mistake; it would be a strategic choice. This is certainly a fuzzy line and one that is sometimes difficult to determine. Courts do not always agree, but the general consensus is that when a party intended to sue another party, but failed to recognize a technical distinction between entities, that is a mistake. Where a party understood those technical distinctions, but chose to sue one party instead of the other, that is not a mistake. Finally, most courts have held that simple lack of knowledge is not a mistake. This means that when a party sues "John Doe" defendants, it will not be able to relate an amendment back to add the proper defendant after the statute of limitations has run. That is considered to be a lack of knowledge, not a mistake under the rule.

IN PRACTICE

As previously noted, state rules of civil procedure are often nearly the same as their federal counterparts. But not always. In general, it appears that the text, numbering, and organization of the civil rules in about half the states is almost completely identical to the Federal Rules. In most of the other states, the concepts and basic ground rules are very similar, but the nomenclature and numbering of the state rules differs from the federal model. In a small number of states, there can be significant divergence between state practice and its federal counterpart.

E. Rule 15(d): Supplemental Pleadings

Rule 15(d) allows parties to add claims to their original pleading for facts that have arisen after the date the original complaint was filed. This is the important distinction between amended and supplemental pleadings. Amended pleadings allow the party to add claims or parties based on facts that occurred before the original pleading was filed. Supplemental pleadings allow the party to add claims based on facts that occurred after the original complaint was filed. Courts have discretion to allow a party to supplement its pleading, and the inquiry is very similar to that in Rule 15(a)(2).

The Rule — Rule 15(d)

Supplemental Pleadings

(d) Supplemental Pleadings. On motion and reasonable notice, **the court may, on just terms**, permit a party to serve a supplemental pleading setting out any transaction, occurrence, or event that happened after the date of the pleading to be supplemented . . . .

EXAMPLES & ANALYSIS

EXAMPLE: Ellen Piza has filed a suit alleging that she suffered gender discrimination while working for her employer, Dawn Co. Piza's complaint alleged that her supervisor berated her with sexist slurs, that the company knew about it, and that the company did not do anything to stop this behavior. She filed her complaint a year ago, but she has continued to work at Dawn Co. during the litigation. Since filing her complaint, however, she has been demoted from her position and has been transferred to a less-prestigious division of Dawn Co. She would like to add a claim of retaliation to her claims against Dawn Co. Can she do so?

Analysis: Yes, she probably can. As long as the court is assured that Dawn Co. will have an opportunity to prepare its defense to these new claims, it will allow the supplemental pleading to be filed. The new claims are absolutely related to the claims in the original pleading, and there is no evidence that Piza delayed bringing these additional claims. They simply arose after her original complaint was filed.

ADDITIONAL EXERCISES

1. Panera files a complaint against Dark Airways, a national airline, in a diversity action on December 13, 2010. He amends the complaint once under Rule 15(a)(1) to change the name. In the complaint, Panera alleges that he injured his ankle while returning to his seat during extreme turbulence on a flight from San Juan, Puerto Rico, to Philadelphia, Pennsylvania. Dark Airways operated the flight. Panera attributes his injury to Dark Airways' negligence in failing to warn passengers of the impending turbulence. Panera's claim against Dark Airways is based on a state theory of negligence. However, after his lawyer does further research, he realizes that Panera cannot bring a state negligence claim against a national airline because that claim is preempted by federal law. He must instead bring a claim under the Federal Aviation Administration's Air Traffic and General Operating Rules. ***Can Panera amend his complaint to make this change?***

2. Phillip Pry was convicted for failing to pay a parking ticket issued 5 years ago and was sent to Dew City State Prison to serve his time. Pry files a complaint alleging numerous violations of his constitutional rights by prison staff. Specifically, he alleges violations of his First Amendment right of access to the courts, freedom of speech and exercise of religion; the Eighth Amendment right to be free from cruel and unusual punishment; and the Fourteenth Amendment right to procedural due process. Pry seeks declaratory and injunctive relief as well as awards of compensatory and punitive damages against the Dew City State Prison System. The court has already granted Pry leave to amend his complaint twice in the face of motions to dismiss by Dew City. Pry would like to amend his complaint a third time with information that he believes will help his case survive. Dew City has filed a 12(b)(6) motion to dismiss the case stating that Pry's proposed amended complaint still fails to state a claim. ***Should the court allow Dry to file a third amended complaint?***

3. On April 9, 2013, Field Agent Ray Pillette filed a claim seeking to recover damages from his employer Dalton Industries. Pillette alleges Dalton discriminated against him under the Americans with Disabilities Act (ADA) after he was confined to a wheelchair from injuries stemming from a space shuttle crash. Pillette was fired from his job on May 3,

2011. Prior to being fired, his supervisor at Dalton removed him from fieldwork and did not give him a reason as to why. Pillette believes it is because of his disability. Dalton argues that Ray's claim under the ADA fails because he was not "qualified" under the ADA and additionally was not fired because of a disability. On May 23, 2013, Pillette learned he could have received accommodations under the Family and Medical Leave Act (FMLA). Dalton did not believe Pillette qualified for FMLA so it did not inform him of the accommodations. The statute of limitations for ADA and FMLA claims is two years. Pillette filed his ADA claim in time, but his FMLA claim is beyond the two-year statute of limitations. ***Can Pillette still amend his complaint to add the FMLA claim?***

4. Polly, a city transit employee who was a member of the Local 180 Transit Union believed the union discriminated against him in the last round of salary negotiations. On June 8, 2009, Polly filed an Equal Employment Opportunity Commission (EEOC) charge against his Local 180 Transit Union. Before Local 180 could retain counsel, the EEOC dismissed the charge and gave Jimmy the opportunity to re-file in 90 days. On September 18, 2009, Jimmy filed a suit and this time he named the Global Transit Union (GBU) as the defendant. GBU is the national organization for the Local 180 Transit Union. Polly served GBU at their headquarters in Washington D.C. A week later, Polly sent a letter to the Local 180 explaining that he was filing charges against Local 180 as well. Local 180 retained Mark Doffa to represent them. On November 29, 2009, GBU also retained Mark Doffa. Doffa, in answering the complaint, asserted that GBU and Local 180 were two distinct entities. On February 4, 2010, Polly sought to amend his complaint against GBU, by replacing GBU with Local 180 as the defendant. Polly stated he had named the wrong defendant and was seeking to name the correct defendant under rule 15(c). Doffa contends that Polly chose to sue GBU instead of the Local 180 and is seeking to have the complaint dismissed. Doffa asserts that under Rule 15(c), Jimmy's amendment does not relate back to his original claim. ***Can Jimmy amend his complaint to replace GBU with Local 180?***

5. Parker filed a tort claim for negligence and product liability against his employer, a package facility, International Delivery Packages (IDP), based in Kentucky. Parker's right arm was amputated after it became

caught between two rollers while he was trying to clear an obstruction off of a conveyor belt. Parker's complaint names IDP, D-Convey, the conveyor belt manufacturer, and Delta Co., the manufacturer of the rollers on the conveyor belt machinery as defendants. The statute of limitations for filing a negligence or product liability claim is two years. Parker filed his complaint right before the statute of limitations ran out. During discovery, Parker discovered another manufacturer of the rollers, Dodin. Even though the statute of limitations on the negligence and product liability claims against Dodin have run, Parker hopes to amend his complaint to add Dodin and ask that the claims relate back. ***Will the court allow Parker to do this?***

6. Paloma, a protester, filed a claim against Agent Morgan, a Secret Service Officer and another Agent, who he could not identify ("Jane Doe"). The claim alleges a violation of Paloma's right to freedom of expression under the First Amendment. Paloma filed his claim right before the statute of limitations ran and served Agent Morgan with the complaint. He has requested that the Secret Service provide him with the name of Agent "Jane Doe" so that he can also serve her with the complaint. The Secret Service is moving to dismiss the claim against "Jane Doe" because the statute of limitations has run. ***Can Paloma still request that the Secret Service provide him with the name for Agent Jane Doe?***

7. In July 1972, Jerry Peck attended his company's annual summer picnic at Lake Erie Water Village. He had a good time at the party: eating, drinking, and swimming a few laps in the main pool. He helped run the family relay races and the pie eating contest. Late in the afternoon, he went over to the water slide to help supervise the children there. Timmy, one of his coworker's children, was a little scared to go down the slide, so Peck offered to go down a few times to show him how fun it was. Unfortunately, he did not see the small sign beside the slide, partially obscured by a shrubbery, stating "Children only, please." He slid down a waterslide head first into four feet of water and was injured terribly. His injuries were so serious that they caused him to become a paraplegic.

   Peck was no longer able to work. His entire home had to be redesigned to accommodate his disability. He lost complete movement in his legs and could only move his arms downwards, using the force of gravity. His wife had to be trained to care for him. She even had to quit her own job so that she could help Peck attend to his needs throughout the day.

Peck's prognosis is not good; it does not seem likely that he will ever regain full use of his limbs again.

Peck brought suit against Dippyslide, the company that allegedly designed and manufactured the slide. The manufacturer's label on the slide said "Dippyslide" in the typeface commonly used by the company at that time. However, Dippyslide has changed its label several times in the past few years after a series of consumer surveys. In addition, Thompson, the owner of Lake Erie Water Village, stated that he had had to re-attach the label when the slide was delivered and that the slide had been delivered in plain packaging. He suggested that Peck confirm who actually manufactured the slide.

In its answer, Dippyslide admitted that it had manufactured the slide. Three separate insurance companies determined that the slide had been produced by Dippyslide: Peck's employer's insurance company, Lake Erie Water Village's insurer, and Dippyslide's insurer. Without inspecting the slide himself, Meyer, the president and owner of Dippyslide, also admitted that the slide was manufactured by his company.

Dippyslide was a pioneer of the waterslide business; at the time of the accident, it made nearly ninety percent of all waterslides sold in the United States. However, it had been experiencing problems with competitors producing slides that were almost indistinguishable from its own and selling them under the Dippyslide name. It began to design slides that had a slightly unusual width, so that it could more readily identify which slides were genuine Dippyslide products. Not infrequently, a consumer would return a slide under warranty to Dippyslide that turned out to have been made by a competitor. Dippyslide would then have to track down the actual manufacturer and bill it for the repairs and the shipping. Meyer identified the slide in question without seeing it, despite the company's difficulty in ascertaining the true manufacturer of the slides in its daily business.

Two and a half years after originally filing suit, in January of 1975, Peck requested that Meyer look at the slide before Meyer gave his deposition in anticipation of trial. Meyer was asked to inspect the slide firsthand to see if it had been properly installed. Meyer agreed and drove over to Lake Erie Water Village from his Lake Erie home. After this inspection, he declared that the slide had not, if fact, been made by his company. He claimed that the slide had been made by Dorner Slides. Dorner

Slides had gotten into the slide-making business a few years after Dippyslide did. It hired a mold maker away from Dippyslide so as to better compete in the water slide business. Thus, its slide looked remarkably similar to the Dippyslide original.

After it realized that it had not manufactured the slide that injured Peck, Dippyslide moved for leave to amend its answer to deny manufacture of the slide. Assume that you are the judge presiding over this case. ***Should the court allow Dippyslide to amend its answer?***

8. Panda bought a ticket to go on a cruise from Florida to Jamaica. Panda initially heard about the cruise line through a series of television advertisements, which boasted "Delago Cruises: Your Ticket to Paradise." When Panda received her travel documents, she noticed that they prominently identified Delago Cruises as the company responsible for the tickets and gave a Florida address for the company. Later, she would learn that the Florida Department of State listed Delago Cruises as the only "Delago" company registered to do business in Florida.

   Panda finally arrived in Florida on February 1, 2010, and picked up her ticket moments before she boarded the boat. The front of the ticket advertised that "Delago Cruises" was the first cruise company in the world to obtain a certification of quality. However, the back of the ticket explained that it was the sole contract between Panda and a "Carrier." The ticket identified the Carrier as "DelagoCrociereS.p.A." The ticket went on to explain that it was DelagoCrociere who owned, chartered, and operated the ship. Panda, having already made her first visit to the all-you-can-eat buffet upon boarding the boat, did not bother to read the back of the ticket. She instead set about to signing up for the all-ship shuffleboard tournament.

   On February 5, 2010, Panda won the shuffleboard tournament. She was so excited that she began skipping along the deck of the boat, boasting of her shuffleboard skills. However, due to her exuberance, she did not notice that there was a large cable on the deck. Unfortunately for Panda, her celebrations were stopped when she fell over the cable and fractured her femur. While the cruise doctor was treating her injuries, Panda tried to explain that she did not have money to pay for a doctor, nor did she have medical insurance. The doctor told her to contact the cruise claims administrator to get reimbursed for any medical expenses she would incur.

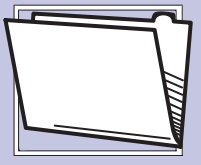
After arriving home from her eventful cruise, Panda hired a lawyer and decided to file suit for negligence against Delago Cruises. The lawyer started by contacting Delago Cruises to inquire whether it would settle before Panda filed suit. While negotiating a potential settlement with Delago Cruises, the Delago Cruises claims administrator clarified that Delago Cruises was a subsidiary of DelagoCrociere. The same claims administrator pointed out the back of Panda's ticket—the part that said that DelagoCrociere owned and operated Delago Cruises—and told Panda and her lawyer that she should contact DelagoCrociere (and not Delago Cruises). Settlement negotiations broke down, and the complaint was filed on February 1, 2011, just in time to meet the 1-year statute of limitations period for a negligence action in Florida.

On February 25, Delago Cruises filed an answer to Panda's complaint, asserting that it was not the proper defendant because it was just an agent for DelagoCrociere. Delago Cruises was represented by Rob Stone. Over the next few months, Panda and her attorney met with Mr. Stone several times. Each time Stone stressed that Delago Cruises was the wrong company to sue, and that DelagoCrociere was the parent company and proper defendant. After some investigation, Panda's lawyer determined that Stone was correct, and that Panda needed to amend her complaint to add DelagoCrociere as a defendant. In addition, her lawyer's investigation turned up a 2007 case in which a similarly situated plaintiff had tried unsuccessfully to sue Delago Cruises instead of DelagoCrociere.

On June 9, 2011, Panda's attorney moved to amend her complaint to add DelagoCrociere as a defendant. The trial court granted her motion to add DelagoCrociere as a defendant and dismissed Delago Cruises from the suit.

After being properly served, DelagoCrociere, represented by Rob Stone (the same attorney that represented Delago Cruises), moved to dismiss because the statute of limitations had run and therefore DelagoCrociere could not be properly joined. After firing the attorney who originally suggested she could sue Delago Cruises, Panda has now hired you as her lawyer. ***Can you defeat DelagoCrociere's motion to dismiss by arguing that DelagoCrociere can be added to her complaint under Rule 15?***

Quick Summary



- Rule 15 is an excellent example of how the federal rules provide parties with the necessary flexibility to pursue their claims.

- When a party acts within a specified time frame, it is free to amend its pleading once as a matter of course under Rule 15(a)(1).

- Even if it misses this deadline or even if it has already filed an amendment as a matter of course, it can still generally amend under Rule 15(a)(2). Either the opposing party or the court, in its discretion, can allow the amendment under this provision. Assuming the amendment is not futile, and assuming the party is not engaging in gamesmanship, the amendment will generally be allowed.

- Under Rule15(b), when an issue comes up in trial and the opposing party objects to allowing an amendment to the pleading, the court will allow the amendment if the opposing party would not suffer prejudice. Or, if the issue is litigated in trial and neither party has objected to it, the parties and the court will treat the issue as if it had been properly pled since the beginning.

- There is a narrowing of the right to amend, however, when the statute of limitations has run. In that case, the rule attempts to balance the need for flexibility under the federal rules with the policy of fairness and repose that underlies statutes of limitations.

- Finally, when facts arise after a complaint has been filed, a party may seek to supplement her pleading. The court has discretion as to whether that supplemental filing should be allowed.