**REVIEW:**

**Waiver of defenses**

1. SMJ- can bring up at any time

2. Failure to state a claim/join necessary party

-If bring up in pre-answer motion must be brought up in 1st one, can’t bring up in 2nd pre-answer motion (unless not available to you at the time)

-But can bring up an answer or later

-interesting disagreement whether can be brought up first on appeal… waived after got a judgment (it may be too late on appeal)

-don’t want to be difficult to raise this defense

3. PJ/Venue/Process/Service

-If submit pre answer motion, must be in it and can’t bring up in 2nd pre-answer motion or later (unless not available to you at the time)

-If first response answer then must be in it (unless not available to you at the time) – small exception: can add it through amendment “as a matter of course” within 21 days

**Amendment**- what if screw up during pleading period and want to change

-very easy to do under Federal Rules

-**Amendment of right** (15(a)(1))

A. 21 days after serving it, or

B if pleading is one to which responsive pleading is required, 21 days after service of responsive pleading or 21 days after service of R 12 motion, whichever is earlier

-**Amendment by leave of court or consent to other side** (15(a)(2))- *Beeck case*

-“freely give leave when justice so requires”

-not enough to refuse amendment just b/c it was the fault of the person requesting amendment- is relevant but not conclusive

-consider fault and prejudice

-prejudice - how bad it is going to be if can’t amend to the person requesting amendment

-prejudice on side opposing - we have waited so long that if amendments allowed won’t have time to mount proper response

*Beeck v. Aquaslide*

-P injured by waterslide accident. Insurers say D’s slide and on basis of that D admits that made slide. Statute of limitations run so can’t sue someone else

-D’s President discovers it is not D’s slide and want to amend answer to deny made slide

-Court allows amendment- mini trial if was slide is D’s slide and determined wasn’t

-Court of Appeal apply abuse of discretion standard for review (deference to trial court)

v. de novo review (no deference)

-Concludes no abuse of discretion to have allowed amendment

-shouldn’t be relevant to permissibility of amendment that if it is allowed P will lose the case

**NEW MATERIAL:**

**Relation Back-** Amendment of complaint is allowed, complaint got in within statute of limitations but new theory added to amended complaint is outside statute of limitations (if independent lawsuit would be dismissed)

Will New Scenario be preserved b/c relates back to original complaint?

If you add something which has nothing to do with the original claim, then it would require different witnesses

But if it is concerning the same conduct, transaction or occurrence of the original claim, then the witnesses would be the same, so it should be fine

Why not always apply relation back for any amendment- b/c would frustrate purpose of statute of limitations

Purpose of statutes of limitations-

1. if you wait too long to sue, witnesses are going to forget so won’t be reliable (this could also be resolved by excluding only those witnesses that are unreliable or by mentioning the problem of unreliability to the jury to let them determine credibility),

2. prevents holding lawsuit over someone’s head (should give defendant repose after a certain time) (this is beneficial for society as a whole - may choose not to invest money b/c afraid that might be sued by someone)

3. docket clearing and makes fewer actions that courts have to deal with

4. waiver – P has voluntary relinquished right by waiting

5. if waited long time to sue then some evidence that you don’t have that much to sue on – does not have merit

-Side note- if suing government, then often have to also make notice of claim (like a letter demanding relief – not a filing of a lawsuit) within a certain time which is even shorter period than statute of limitations

-Side note- used to be tolling rules that statute of limitations tolled when P or D moved out of state because of problems getting PJ in such cases

-Conduct/transaction/occurrence test for relation back

* if conduct/transaction/occurence is same then witnesses would likely be the same will still be refreshed witnesses (same witnesses as 1st cause of action)- satisfies evidentiary argument
* P sues D for breach of contract. P amends complaint to include new theory of liability (promissory estoppel)- relation back b/c still same conduct, transaction, occurrence
  + would likely be same witnesses- people there when promise made
  + violating right to repose is not a concern b/c already being sued about this same event
  + didn’t waive right to sue about this event b/c already filed lawsuit
* NOTE: if P amended complaint to add a cause of action that has *different* statute of limitations that is still outside when one go back to the original complaint then too late even with relation back

***Blair v. Durham***

Facts- Durham was working in office where Blair was doing construction. Piece of scaffolding fell and injured her. Durham brought suit that Blair was negligent in that employees were doing a bad job and dropped board on head. In middle of trial, amended complaint to allege different liability b/c negligent construction of scaffolding. Person who dropped board was employee of independent contractor not of D (can’t sue independent contractor b/c outside statute of limitations b/c like a brand new lawsuit so would frustrate statute of limitations) so have to stay w/ old D.

Added new theory on why Blair was liable

- relation back allowed

- decision appealed after trial, affirmed

-relation back “depends upon whether the amendment stated a new cause of action”- awful definition and don’t use it

What does cause of action mean?

- if a new legal theory of liability then a new cause of action

- but even if new cause of action can still have relation back – e.g. first breach of contract then promissory estoppel

-“As long as a plaintiff adheres to a legal duty breached or an injury originally declared on, an alteration of the modes in which defendant has breached the legal duty or caused the injury is not an introduction of a new cause of action.”

-court says same injury but totally different theories means relates back

-bad definition b/c wrongdoing can be so different and dissociated from that alleged in original complaint that there would be no relation back even if same harm

-bad b/c evidentiary overlap is minimal

-i.e. P sues D for negligent manufacturing b/c the product bought blew up in his face. Amended complaint to allege negligent hiring of workers- hiring of an employee w/ a criminal record for maliciously putting bombs in product

- Green says different conduct, transaction, occurrence

-no evidentiary overlap

-repose- totally different wrongdoings

-harm is not only thing that is relevant

-Example “ P sues D for battery w/in statute of limitations. P finds out X committed battery. P amends to name X and serves X. Relation back?

- no b/c if add party then no relation back

- X had repose even if same witnesses

* Amendment to change defendant relates back only if there was a wrong name on complaint (e.g. defendant sued as individual business but was really incorporated business) and rightful defendant got notice within statute of limitation- 15(c) rules

**Counterclaims**

-complex litigation- new causes of action being added by people not the P’s

-Rule 13 (a)- compulsory counterclaim rule

-(1) pleading must state as a counterclaim any claim that at the time of service the pleader has against an opposing party if claim:

(A) arises out of transaction or occurrence that is the subject matter of the opposing party’s claim; and

(B) does not require adding another party over whom the court cannot acquire jurisdiction

-have to bring up counterclaim that has to do w/ same transaction & occurrence or will lose forever

Compulsory counterclaim rule bars a new action being brought by the defendant against the plaintiff regarding the same transaction as a claim that π brought against the Δ in a federal court.

-1st case still going on w/ no judgment yet, D still barred from bringing up another lawsuit on same issue—doesn’t matter that no judgment yet

-but can still amend answer in first lawsuit after 21 days to introduce counterclaim if justice so requires by the court

-function for compulsory counterclaim rule: would be extremely inefficient to keep retrying same incident (witnesses, court time/effort)

-example-

- suit 1 in court system 1, judgment, then suit 2 in court system 2

- which law do we use to determine if D barred?

- use law of court system 1

- if system 1 is state court and system 2 is federal court, this follows from Full Faith and Credit statute

- if system 1 is state court and system 2 is a sister state court, this follows from the Full Faith and Credit Clause

- if system 1 is federal court and system 2 is a state court this (probably) follows from Supremacy Clause

* Full faith and credit clause is state’s duty to respect sister state judgments
* Full faith and credit statute covers federal court’s duty to respect state judgments
* Full faith and credit given by states to federal judgments is likely supremacy clause

-(2)

-What prevents P from bringing 2nd separate cause of action regarding same transaction/ occurrence after judgment-

*claim preclusion* (common law doctrine, not federal rules)

-prior action pending doctrine- bars P from filing 2nd lawsuit on same transaction/ occurrence before judgment on the 1st lawsuit

Claim preclusion, prior action pending and compulsory counterclaim rule are affirmative defenses pleaded and proved by defendant