Lect 23

Amendment of pleadings

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.

Standard for amending when not as a matter of course

15(a)(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.

- through consent of opposing party

- or: “freely when justice so requires”

very liberal

What are factors?

- prejudice

- cost to the would-be amender of being unable to amend

- cost to the party responding to the amendment if amendment is allowed

- e.g. it is too difficult to assemble the evidence to counter the amended pleading

- undue delay

- it is relevant that the party requesting amendment could have made the request earlier

- but it is not dispositive

- bad faith

- e.g. put off amending to harm other side

- liberality of amendment follows from the notice pleading system

- it should be possible to amend when new facts come out of discovery

NOTE: There will be a scheduling order at the beginning of the discovery period which will often set limits to amending - if you break that limit you will have to show that it could not be avoided

Beeck v Aquaslide

* Beeck injured at pool party by what appeared to be an aquaslide slide
* Aquaslide sends insurance adjuster who says it is aquaslide’s
  + Also home association adjuster and Beeck’s employer, who threw the party, looked at it and concluded it was an Aquaslide slide
* D admits that D was the manufacturer
* statute of limitations had passed so P cannot bring suit against another party
* Then the D’s president visits pool and discovers not aquaslide side
  + Asks to amend answer to change admission that it was the manufacturer to a denial
  + Should it be granted?
  + Why not as matter of course? - not 21 days after serving answer on Beeck

Dist Ct allowed amendment

* On appeal to Ct App used abuse of discretion standard
  + - Not de novo
    - Most appellate cases we have read have been de novo review
      * in de novo Ct App does not defer to the trial court
  + Why abuse of discretion in this case?
    - fact intensive question and district court is closer to the relevant facts
      * hard to get relevant facts into materials the Ct App will look at
    - relevant factors include burden on trial court, so trial court should have discretion about the matter

What are factors in this case

- undue delay?

- does not appear that Aquaslide could have amended earlier

- bad faith?

- any evidence that the President of Aquaslide held back intentionally? - unlikely - why protect the counterfeiters?

- prejudice

- relevant prejudice should probably not include the fact that Beeck cannot bring suit against the counterfeiters

- Beeck hardly can claim prejudice simply because he cannot now sue Aquaslide for something it didn’t do

- what would be a more appropriate example of prejudice?

* + witnesses Beeck interviewed to counter the answer would be difficult to get again in order to respond to the amended answer

Ct App concludes not an abuse of discretion

**Relation back:**

15(c) governs when the amendments of a complaint, although occurring after the statute of limitations has run, will nevertheless fall within the the statute of limitations because they “relate back” to the original complaint, which was within the statute of limitations

Why not always allow relation back – no limits?

* what is purpose of a statute of limitations?
  + bar cases when evidence gets too stale
  + give defendant repose after a certain period of lime
  + maybe the fact that the plaintiff waits a long time to sue means that the case likely have less merit?
  + the plaintiff, by waiting so long, has, in effect, relinquished his right to sue (as occurs in waiver or settlement)

Given this, would always allowing relation back make sense?

P sues D (within the statute of limitations) for battery

After the statute of limitations had run on his breach of contract action against D, P amends his complaint against D to include the breach of contract action

* with unlimited relation back, the contract action would be saved
* but the evidence in the two actions does not overlap
* and although the D has no right of repose concerning the battery event (because the plaintiff sued in a timely fashion) that does not mean that D does not have a right of repose concerning a different event – the alleged breach of contract

why not say relation back is never allowed?

P sues D (within the statute of limitations) for breach of contract

After the statute of limitations had passed, P amends his complaint to include a new theory of liability – promissory estoppel (which does not require a contract)

If relation back was never allowed the promissory estoppel action would be barred

* but the evidence in the two actions probably overlaps a great deal – if the evidence in the contract action is not stale (because the P chose to sue in a timely fashion) the evidence in the estoppel action should not be stale either
* also the D’s right to repose is really about events, not particular causes of action
  + the D has no right to repose concerning the event that was the subject of the contract action, and the estoppel action concerns that same event

This is how 15(c) solves it:

*FRCP 15(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:  
        (A) the law that provides the applicable statute of limitations allows relation back;  
        (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*

Blair v. Durham

Appellant/Defendant Blair (construction company) and appellant/defendant Roberts (manager) were sued by appellee/plaintiff Durham (employee of Social Security Admin.) for negligence due to beam falling on her head during construction

- original complaint alleged negligence of employees in dropping beam

- it became clear that the people who dropped the beam were employees of a subcontractor

- too late to join the subcontractor as a defendant - beyond the statute of limitations and no relation back allowed (with narrow exceptions) when a new party is added through amendment

- so had to come up with new theory of liability against Blair -

- amended complaint to allege negligent construction of scaffold

- Ds made motion to dismiss amended action on statute of limitations grounds

- denied by dist ct

- appealed to 6th Cir.

what is standard at issue in 15(c)

* whether claim or defense arose out of the same conduct trans or occurrence set forth or attempted to be set forth in original pleading

- Ct App introduces some bad glosses on this standard

“The issue here as to whether the statute of limitations was tolled by the original complaint depends upon whether the amendment stated a new cause of action”

does not work:

P sues D (within the statute of limitations) for breach of contract

After the statute of limitations had passed, P amends his complaint to include a new theory of liability – promissory estoppel (which does not require a contract)

* this is a new cause of action but relation back should be allowed

another gloss is this:

“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.”

* this probably does not work either

Example

* P sues D for negligent manufacturing because the product he bought blew up in his face
* After the statute of limitations ran, he amended his complaint to allege negligent hiring of workers – in particular the hiring of an employee with a criminal record for maliciously putting bombs in products
* under the Court’s reasoning there should be relation back, but it is not clear whether that is true – here the harm is the same and the cause of action is negligence in both, but the negligent conduct is very different (different witnesses would be relevant...)

SPECIAL RULE FOR AMENDING TO ADD PEOPLE – (did not assign, but will illustrate)

P sues D for battery within the statute of limitations  
- After the statute of limitations has run, he find out that X is the one who committed the battery  
- P amends the complaint to name X and serves X  
- relation back? NO

* problem is that there’s usually no notice to new party at the time of the original complaint
* BUT can be allowed when the defendant in the amendment complaint had received notice that he was the party being sued when the original complaint was served, e.g.
  + P sues an individual doing business under the name of "Malibou Dude Ranch,"   
    - after the limitations period had run P discovered that the owner of the business was "Malibou Dude Ranch, Inc.," a corporation, and that the individual was merely the corporation's agent, who was competent to receive service on behalf of the corporation  
    - P amends the complaint to name the right defendant and serves the individual again  
    - relation back?
    - Yes

Res Judicata and the preclusive effects of judgments

* the law of preclusive effect answers this question:
* what are the consequences of previous litigation?
* to what extent does it limit future litigation?
* will start with claim preclusion
* two reasons to mention this in pleading period
  + it is an affirmative defense that is introduced in the answer
  + it is also a compulsory joinder rule and we will very soon get to joinder (i.e. when parties may, must, and must not join causes of action and parties)

the law of preclusive effect is largely judge-created

it is fluid

but it’s crucial

start with claim preclusion – simplest case

P sues D in California state court for negligence in connection with a car accident.

P loses – the jury finds that D was not negligent. Judgment for D.

P sues D in California state court for negligence in connection with the same car accident, hoping the jury will get things right this time.

* barred by claim preclusion
* if something went wrong in first suit, the P must appeal or make a motion to set aside the judgment before the rendering court

P sues D in California state court for negligence in connection with a car accident.

P wins – the jury finds that D was negligent and awards P $100,000.

$100,000 in D’s bank account is attached by the court and given to P.

D sues P in California state court to get the $100,000 wrongfully taken from him.

* here D is claim precluded

Those are the simplest examples, but claim preclusion is also a compulsory joinder rule – obligating the P to join certain causes of action or lose them forever

P sues D in California state court for negligence in connection with a car accident. P asks for $100,000 in personal injuries.

P wins – the jury finds that D was negligent and awards P $100,000.

$100,000 in D’s bank account is attached by the court and given to P.

P then sues D in California state court for negligence in connection with the same car accident, asking for compensation for property damages he sustained.

* claim precluded – should have asked for property damage in the first suit

P sues D in California state court for breach of a contract to build D a house. P built the house but D won’t pay.

P loses – the jury finds that there was no consideration and so no contract. Judgment for D.

P then sues D in California state court for quantum meruit – that is, for the fair market value of the work he performed.

* claim precluded – should have included the quantum meruit action in first suit

This amounts to a compulsory joinder rule – when you bring one cause of action you must bring others

NOTE: at common law the scope of a claim was narrower – you could sue in law and then sue again in equity

- some states still have a narrow understanding of the scope of a claim

- Note that res judicata has been expanded because of increased expense of litigation and the introduction of the process of discovery

- given discovery and the cost of litigation it makes sense to require the P to bring all causes of action he had concerning a transaction

- The book makes res judicata a general term to include claim and issue preclusion

- sometimes courts will speak of res judicata as only claim preclusion

- best to avoid the term res judicata entirely and simply speak of claim preclusion or issue preclusion, depending upon which is being referred to

- when speaking of preclusive effect in general – just talk about preclusive effect