Civil Procedure Notes Oct. 12

Rule 11

* Is about a certification that occurs when you sign/file/advocate
* You violate rule 11 by violating that certification
  + that to the best of the person’s knowledge, information, and belief, formed after an inquiry reasonable under the circumstances…
  + (1) it is not being presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation;  
      
    (2) the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law;  
      
    (3) the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery; and  
      
    (4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on belief or a lack of information.
* Answers will be signed and will have a certification with them too – the denials must be “warranted on the evidence or, if specifically so identified, are reasonably based on belief or a lack of information”

Now…

(1) it is not being presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation;

*Sussman v. Bank of Israel*

* Sussman was shareholder of bank of Israel
* Litigation brought by government/receiver of bank in Israel
* Sussman’s attorney sent a “reputational warning” to governmental officials that he would plan on suing in US if they didn’t stop
* They didn’t
* brought litigation in United States in SDNY

SMJ?

* Alienage?
  + Sussman v. Israeli officials?
  + No – Sussman was Swedish (or maybe Swiss…)
  + Destroys alienage
* Was really brought under 28 USC 1330
  + Suits against nations (brought against Israel)
* Dismissed for forum non conveniens
* Concluded that Israeli law would most likely apply -> Israel would be a better forum

Then Ds..

* Moved for rule 11 sactions
  + Dist Ct -> claim was brought with improper purpose so sanctioned lawyer
* On appeal,
  + The letter was not sufficient to show improper purpose
    - The pressure from letter was similar to pressure put on parties frequently
  + in addition, even if there was an improper purpose, the fact that the claim was non-frivolous means that sanctions were inappropriate
  + not frivolous because SDNY had venue -> even if it was inconvenient
  + this is a common view - that R 11(b)(1) can be violated only if the paper is also frivolous, meaning that R 11(b)(2)-(4) are violated too
  + 2d Cir points to objective standard as reason to conclude this
    - Green: hard to see how that makes sense – objective standard is more about (b)(2)(3)(4)
  + Circuits disagree if you can sanction under (1) even if its non-frivolous

Court’s Inherent Power?

* Do have an inherent power to sanction independent of violation of R 11 certification
* But unlike R 11, which is an objective negligence standard, requires a bad motive

Amendment

* You don’t know very much going in beginning
* Rule 11 screens at beginning, but discovery will reveal information
* Have to be able to amend your complaint

15(A)- Amendment of Right can amend a pleading as a matter of course (without court’s permission) once,

* + 21 days after serving pleading OR
  + if the pleading is one to which a responsive pleading is required
    - * ex// complaint -> a response is required
      * also counterclaims or cross claims
      * Answers are **NOT**
        + May have factual allegations but do not have to reply to them
    - Then can amend of right 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.
  + Notice effect of amendment of right on disfavored defenses…

HYPO:

P files a complaint and serves D in accordance with R.4

* 21 days later, D answers, introducing the defense of failure to state a claim
* 20 days after that, P tries to amend his complaint as a matter of course to respond to D’s defense
* Can he?
* YES, - the complaint is a pleading to which a responsive pleading is required and D amended complaint within 21 days of responsive pleading

P files a complaint for negligence and serves D in accordance with R. 4

* 21 days later, D answers, introducing the affirmative defense of contributory negligence-
* 20 days after that, D makes a motion to amend his answer “as a matter of course” to include the defense of lack of personal jurisdiction  
  does this work?
* YES, the answer is a pleading to which no responsive pleading is required but it can still be amended of right within 21 days of serving it and this was amended 20 days after serving

P files a complaint for negligence and serves D in accordance with R. 4

* 21 days later, D answers, denying negligence, introducing the affirmative defense of contributory negligence, and adding a counterclaim against P for negligence
* 21 days after that, P answers the counterclaim (denying negligence)
* 20 days after that, D makes a motion to amend his answer “as a matter of course” to include the defense of lack of personal jurisdiction  
  does this work?
* There is a problem here
  + Is the answer a pleading to which a responsive pleading is required (because it has a counterclaim)?
  + If it is then D can amend the answer of right up to 21 days after receiving the responsive pleading
  + an amendment of an answer of right would save the otherwise waivable defenses (provided that the answer was D’s first response)
  + Glannon says the counterclaim makes the answer a pleading to which a response is required
  + Green: Glannon has to be wrong – the answer and the counterclaim are different pleadings
    - That means that you can save a waivable defense by amending an answer of right only up to 21 days after serving the answer

15(A)(2) – Other Amendments

* Courts give leave freely when justice requires it
* Green: the effect of a Scheduling Order – spells out how discovery will go and will speak of when amendments should be finished
  + Amendments after scheduling order has said when amendments are appropriate will be more difficult

Factors that come into play for Justice requiring amendment

* Prejudice (preparation) – “if I had known about this earlier I wouldn’t have destroyed…”
  + Merits prejudice does not count
    - Merits prejudice would be – “now I might lose because you have added some really good stuff”
  + Later stage of litigation will mean more likely there is preparation prejudice
* Futility – amendment will not help because what is added is legally useless
  + For example, no reason to amend complaint to add new theory of liability because new theory doesn’t arise out of the same transaction and so doesn’t relate back -> outside the statute of limitations
* Diligence – you could’ve brought it up earlier
  + But even if not diligent does not mean you are completely prohibited from amending – just one factor
    - Prejudice may not be so great, so that courts allow amendment anyway
* Bad Faith – Waiting until the last minute intentionally to hoodwink other side

*Beeck v. Aquaslide*

* P injured on waterslide
* Three different insurance companies looked at it and said it was aquaslide slide
* D admitted that aquaslide had manufactured and distributed the slide
* Statute of Limitations expired (so possibly can’t sue anyone else)
* Then president of Co looks at slide and sees it is counterfeit
* Amendment by leave of the court to add denial that it was an aquaslide slide
  + - District Court allows it
    - appealed
* Standard of Review
  + Abuse of discretion

considerations

* Prejudice to the plaintiff?
  + Green: this case deals with merits prejudice
    - The problem is not that there is some evidence Ps had that they have destroyed etc. but only that this means that they will not be able to prevail against the D and may not be able to go against the correct party
  + Court seems to take this type of prejudice seriously anyway, but says that it is not clear that there will be prejudice – might be able to sue counterfeiters anyway
    - Could sue for Fraud/contract actions -> 6 year limitations rather than shorter one for tort
    - Or particular tolling doctrines might save case against counterfeiters
* Bad Faith?
  + - Isn’t there a possibility of there being bad faith? Why did the D wait until the statute of limitations had run?
      * Unlikely - They would be helping out the counterfeiters if they held off before they made their amendment
* Diligence?
  + they were relying on the word of 3 insurance companies
  + Maybe they should have done it earlier but it’s not enough
  + Even if they screwed up it would likely be allowed

Amendment During Trial

* A lot harder to ask for amendment at trial
* BUT - some evidence may be introduced that is outside the scope of the complaint
  + P is introducing a new theory of liability
    - D will accept it (by failing to object) and it will be part of the lawsuit
    - Implicit amendment of the case

Relation Back

* With respect to claims for relief
  + You have a complaint
    - Amend to add a new theory of liability
    - But amendment (as free standing complaint) is outside the statute of limitations
    - by relating back to original complaint protected from statute of limitations bar
  + Basic idea of relation back is that the purpose of the statute of limitations has been satisfied even when amendment is allowed
    - What are the purposes of statute of limitations
      * Evidentiary argument - the sooner the more likely the evidence will be accurate
      * Repose argument
        + Have a right to eventually be free from worry about a suit for possible wrongdoing
        + Economic argument: can’t put resources to productive use if saving them anticipating lawsuit
      * Waiver argument
        + a P that sits on his rights waives them (use it or lose it)
  + The conduct, transaction, or occurrence standard captures this
  + If D is sued within the statute of limitations, he will preserve evidence concerning the transaction as a whole, not just particular causes of action
  + If D is sued within the statute of limitations, he does not have a right to repose concerning the transaction – the right will not be violated if new theories of liability are brought up about the same transaction
  + If D is sued within the statute of limitations, he has not sat on his rights, even if the particular rights are not brought up at that time

15(c)(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

Notice that either will work – state law (if state law provides the statute of limitations) or the conduct, transaction, or occurrence test

HYPO:

- 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)  
- is P’s action for promissory estoppel time barred?

**DEPENDS**

It is the same conduct, transaction, or occurrence

BUT

Do you even need relation back? Promissory estoppel might have a longer statute of limitations – don’t even need relation back – will be inside statute of limitations at time of amendment

OR

Might be barred even if there is relation back. Promissory estoppel might have a shorter statute of limitations – might be outside statute of limitations even at the time of the original complaint

- P sues D (within the statute of limitations) for battery  
- after the statute of limitations had run on his battery action against D, P amends his complaint against D to include a breach of contract action  
- is it time barred?

Cannot use relation back – surely is not same conduct transaction occurrence

*Bonerb v. Caron Foundation*

* Rehab facility
* Part of mandatory counseling: required to play basketball
* Slipped and fell
* Sued the Foundation for negligence
  + Didn’t maintain the court properly
  + Subsequently, wanted to amend to add counseling malpractice action
  + Bad counselors by making him play basketball on bad court
* Green: original theory may not have worked -> they don’t have a duty to maintain a basketball court that ISN’T THEIRS

Issues:

* Will amendment be allowed?
  + Yes – early in discovery
* Will it relate back?
* YES – same conduct trans or occurrence
  + Will be largely the same evidence

HYPO

- 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

* This one is harder
  + Same harm
  + But cause of harm is completely different
  + Different evidence
    - Hiring v. Manufacturing
* An example where courts might disagree about whether relation back is allowed