Amendments

15(a) Amendments Before Trial.

(1) Amending as a Matter of Course or “**Of Right**”.

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.

* How you can save one of the waivable defenses – if the answer is first response can amend it of right within 21 days
* Complaint: 21 after you get the responsive pleading or a rule 12 motion

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.

Relation Back

* About statute of limitations
* Important because they can block actions
* Exist when a party amends a complaint and adds a new theory of liability
* Must “relate back” to the original complaint
* Consider limitation period of new cause of action
  + Could be longer/shorter than original cause of action
  + If it’s shorter, relation back may not help you
  + if it’s longer, may not need relation back
* Mostly concerns new theory of liability under same law, less about new cause of action

2 ways to get it

* law concerning statute of limitations (e.g. state law in diversity case) allows it
* Satisfies 15(c)(1)(B): conduct, transaction or occurrence test

NOW relation back when new parties are added

in general there should be no relation back when new parties are added

Hypothetical 1: Beeck sues Aquaslide within the statute of limitations/ after the statute of limitations has run, Beeck amends the complaint to add Counterfeiter as the defendant and has it served/ relation back? **No because Counterfeiter would not know about lawsuit.**

**But narrow circumstances where it makes sense:**

Hypothetical 2: P sues an individual doing business under the name of "Malibou Dude Ranch" within the statute of limitations/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 again/relation back? **Yes because defendant knows the lawsuit is occurring and is rightly against him – just a mistake of identity**

this is dealt with by:

15(c)(1)(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.

Hypothetical 3: the statute of limitations ends June 1/ P files on June 1 and has D served within the 4(m) time period (90 days)/Ok? **Depends on the relevant statute of limitations that the court will use. Most states view statute of limitation tolling at service. Others & federal rule (federal question cases) view tolling at filing.**

Hypothetical 4 (tolls upon filing):

- assume that the relevant statute of limitations (which ends on June 1) tolls upon *filing*  
- P sues D for battery, files on June 1 and serves D on July 1   
- on July 1, X gets notice   
- on July 2, P amends to add X  
- is notice adequate for relation back?

**Yes. This is why the part about 4(m) was added – if the 15(c)(1)(C) instead said that there must be notice within the statute of limitations there would be no relation back**

Hypothetical 5 (service):

- assume that the relevant statute of limitations (which ends on June 1) tolls upon *service*  
- P sues D for battery, files on May 31 and serves D on June 1   
- on July 1, X gets notice   
- on July 2, P amends to add X  
- is notice adequate for relation back? **Yes because it within the 4(m) period (within 90 days of filing). This shows that when the relevant statute of limitations has tolling on service rather than filing the addition of the 4(m) part in 15(c)(1)(C) extends notice for the party added beyond what would be allowed for the original party**

Hypothetical 6

- assume that the relevant statute of limitations (which ends on June 1) tolls upon service  
- P sues D for battery, files on January 1 and serves D on March 1   
- on June 1, X gets notice   
- on October 2, P amends to add X  
- is notice adequate for relation back?

**Yes, although it is outside the 4m period, it is within the statute of limitations.**

This is not in 15(c)(1)(C) itself but courts have rightly assumed it is OK

Distinguish two questions:

1. Is amendment allowed? – that is addressed by the “freely as justice so requires” considerations spelled out in Beeck – if amendment is very late there might be prejudice and so it might not be allowed
2. If amendment is allowed, will there be relation back? The fact that amendment is very late does not affect whether relation back occurs – that is determined only by the requirements in 15(c)(1)(C)

What kind of notice? Relation back is not concerned with Rule 4 notice e.g. satisfying 4(e) or 4(h) - It’s just about whether the newly added party actually found out about the lawsuit or not (could be because someone else gave them the complaint)

* also don’t confuse with *Mullane* – it is about whether they actually found out, not whether there was notice reasonably calculated to apprise the new party of the suit

Hypothetical 7: P, an employee of D, sues D for the tort of a fellow employee X within the statute of limitations/X gets notice with statute of limitations/outside the statute of limitations, P then realizes the fellow servant rule forbids suit against D, so P amends to add X and serves him

* No relation back because the mistake was about whom to sue...not a mistake about the identity of the party

Hypothetical 8: P sues the City of X and “unknown officer” in federal court for violation of her civil rights/within the period in 15(c)(1)(C)(i) D (the unknown officer) gets notice with the statute of limitations/relation back? **There’s disagreement among the courts on this. Some courts say this isn’t about the wrong name or “proper identity”--they don’t even know the identity of the officer. Other courts say it’s okay because the officer had actual notice and knew that the P wanted to sue him**

**NOW**

Complex Litigation/Joinder of parties & causes of action

Under what circumstances can a party join two defendants or when can two plaintiffs sue one defendant? Questions of joining parities/causes of actions and when is it allowed/required?

2 questions:

1) are people already adversaries? (are they already suing or defending a suit against each other?)  
2) does the cause of action concern the same transaction or occurrence as an action already being litigated?

One type of joinder permitted:

1) are people already adversaries? YES  
2) does the cause of action concern the same t/o as an action already being litigated? NO   
joinder permitted, not required

* Example of this: P sues D for battery  
  can/must D join a claim against P for breach of an unrelated contract? **Permitted. It’s a permissive counterclaim**

**13(b): Permissive Counterclaim. A pleading may state as a counterclaim against an opposing party any claim that is not compulsory.**

Hypothetical 9: P sues D for battery  
can/must P join an action against D for breach of an unrelated contract? **Yes because they are already in adversarial position. It is not the same transaction. It is permitted but not required. Rule 18(a).**

**18(a)   
In General. A party asserting a claim, counterclaim, crossclaim, or third-party claim may join, as independent or alternative claims, as many claims as it has against an opposing party**

Hypothetical 10: P (NY) sues D (Conn.) in federal court in D. Wyo. for a battery that occurred in Wyo. /D answers/ amends to join an action against D for another battery that occurred in Texas/PJ and V for the Texas battery action? **Joinder rules do NOT create PJ/SMJ/Venue**

Another type:

1) are people already adversaries? NO  
2) does the cause of action concern the same t/o as an action already being litigated? YES  
joinder permitted, not required

* Example of this: P sues D1 and D2 for battery  
  can/must D1 join an action against D2 for his damages in the brawl? **Permitted but not required. D1 and D2 are not already adversaries but it is the same transaction or occurrence. Requiring it would affect autonomy of parties.**
* This is a **cross claim**
* 13(g) Crossclaim Against a Coparty. A pleading may state as a crossclaim any claim by one party against a coparty if the claim arises out of the transaction or occurrence that is the subject matter of the original action or of a counterclaim, or if the claim relates to any property that is the subject matter of the original action. The crossclaim may include a claim that the coparty is or may be liable to the crossclaimant for all or part of a claim asserted in the action against the crossclaimant

Hypothetical 10: P sues D1 for battery  
can/must P join a battery action against D2 concerning the same brawl? **Permitted but not required. Rule 20.**

**Rule 20. Permissive Joinder of Parties  
(a) Persons Who May Join or Be Joined.  
 (1) Plaintiffs. Persons may join in one action as plaintiffs if:  
 (A) they assert any right to relief jointly, severally, or in the alternative with respect to or arising out of the same transaction, occurrence, or series of transactions or occurrences; and  
 (B) any question of law or fact common to all plaintiffs will arise in the action.**

**(2) Defendants. Persons . . . may be joined in one action as defendants if:  
 (A) any right to relief is asserted against them jointly, severally, or in the alternative with respect to or arising out of the same transaction, occurrence, or series of transactions or occurrences; and  
 (B) any question of law or fact common to all defendants will arise in the action.**

Hypothetical 11: A, B, C, and D, each driving separate cars, get into a car accident/A sues B and C for negligence/may B bring a crossclaim against D for negligence? **No. Cross claims have to be between people who are already parties (but not adversaries)**

may B bring a crossclaim against C and D for negligence?

**now Yes – the action against C is an appropriate crossclaim and D can be added under R 20**

**Rule 13. Counterclaim and Crossclaim  
   
(h) Joining Additional Parties. Rules 19 and 20 govern the addition of a person as a party to a counterclaim or crossclaim.**

Hypothetical 12: P sues D1 and D2 for damages in a battery/ may D1 cross-claim against D2 for breach of an unrelated contract? **No. They are not in an adversarial position and it does not concern the same transaction. It does not satisfy 13(g).**  
  
assume that D1 cross-claims against D2 for his damages in the battery/ may D1 now join an action against D2 for breach of an unrelated contract? **Yes. Even though not same T/O allowed under 18(a)**

Hypothetical 13:P sues D for battery concerning P’s damages from a barroom brawl/ may D counterclaim against P for his damages from a different brawl between P, D, and X? **Yes. 13(b).**  
may D join X to this counterclaim? **Yes. Same transaction and at least one question of law or fact in common. Rule 20.**

Joinder required type:

1) are people already adversaries? YES  
2) does the cause of action concern the same t/o as an action already being litigated? YES  
joinder required

\*This is important. If you fail to bring an action that you are obligated to bring, it is gone forever.\*

* P sues D for battery  
  may/must P join an action against D for defamation concerning statements that D made during the brawl? **MUST join battery & defamation. There’s no rule of civil procedure on this but it is about claim preclusion.**
* P sues D for battery  
  may/must D join an action against P for his damages in the brawl? **MUST. Compulsory counterclaim.** 
  + **Once you are sued, you must bring every COA against the party suing you concerning the same transaction.**
  + 13(a) Compulsory Counterclaim.  
    (1) *In General.* A pleading must state as a counterclaim any claim that—at the time of its service—the pleader has against an opposing party if the claim:  
    (A) arises out of the 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.

King v. Blanton

* Car accident. D represented by insurance company – settled the suit and did not bring compulsory counterclaim was not brought up so D’s cause of action was gone forever. This was North Carolina’s rules.
* Settlement could have solved this problem if the settlement agreement said they are settling P’s action but does not include counterclaims

Hypothetical 14: P sues D in federal court for negligence in connection with a car accident/two days later D sues P in federal court for negligence in connection with the same accident/what should P do in connection with D’s suit…? **Tell D, this action is a compulsory counterclaim to P v. D so D will amend their answer. This can be used to dismiss second action. This is about efficiency.**

Hypothetical 15: P sues D in federal court for negligence in connection with a car accident/two days later D sues P in federal court for negligence in connection with the same accident/P does not mention that D’s suit is a compulsory counterclaim to his earlier suit/a year later, P’s suit comes to a judgment/P then brings a motion to dismiss D’s suit? **By P’s failing to bring up comp. Counterclaim defense in D v. P, the current view is that P doesn’t get the benefit of the comp. Counterclaim rule. P acquiesced in the duplicative litigation**

Exceptions to Compulsory Counterclaim Rule

Hypothetical 16: P (Md) sues D (DC) in state court in Maryland for negligence in connection with a car accident/D sues P in federal court in Maryland concerning his damages concerning the same accident/ is P’s action against D a compulsory counterclaim to D’s action against P…? **No. It pre-existed.**

1. ***Exceptions.* The pleader need not state the claim if:  
   (A) when the action was commenced, the claim was the subject of another pending action; or**

**Notice that D v. P is not a compulsory counterclaim to P v. D because Maryland does not have the comp. counterclaim rule.**

Hypothetical 17: P (NY) sues D (Germany) in federal court in New York concerning a car accident in Germany/the source of personal jurisdiction over D is $80,000 in D’s bank account in NY/is D’s action against P for his damages in the same accident a compulsory counterclaim? **Does not apply because PJ is from attachment. NY’s power over D is only $80,000.**

**13(a)(2) *Exceptions.* The pleader need not state the claim if:  
…  
(B) the opposing party sued on its claim by attachment or other process that did not establish personal jurisdiction over the pleader on that claim, and the pleader does not assert any counterclaim under this rule.**

Hypothetical 18: P sues D for battery in state court within the statute of limitations/D answers, bringing a compulsory counterclaim for his damages from the same brawl/by the time of the answer, the counterclaim is outside of the statute of limitations/is it barred? **The statute of limitations has essentially be waived. There’s no federal rule on this (it is not covered by relation back) --it is a generally accepted practice.**

What about a jurisdiction with no compulsory counterclaim rule?

* Hypo where P sues first in MD court (where there is no compulsory **counterclaim rule). D sues second in federal court (where there obviously is). Is the second action dismissed? Why or why not? Under the full faith and credit statute, the federal court must give full faith and credit to the MD judgment by giving it the same preclusive effect that it has in MD ct – it would not bar D’s suit against P in Md ct so it does not in fed ct**
* **Reverse situation. State court should give fed judgment the same preclusive effect that it has in fed ct (probably due to the supremacy clause). the fed judgment would bar D’s suit against P in fed ct so it does in MD ct too**

What about situations where the counterclaims has no SMJ – doesn’t have to be brought?

* The counterclaim is not compulsory if the original court cannot entertain the claim.
* P sues D in California state court for breach of a contract to pay for securities  
    
  - D fails to join an action against P for violation of federal securities law in connection with the sale (because such an action has exclusive federal SMJ)  
    
  - California has a compulsory counterclaim rule  
    
  - subsequently D brings an action in federal court in California against P for violations of federal securities law  
    
  - P claims the action is barred under California's compulsory counterclaim rule  
    
  - what result? not barred
* However, if the court can entertain the claim, then the counterclaim is compulsory.

- Officer P sues arrestee D in California state court for battery in connections with P's arrest of D  
  
- California has a compulsory counterclaim rule  
  
- must D join in his answer his federal civil rights action against P concerning P's actions in the arrest?  
  
 - if D brings the counterclaim, may P remove?

* No. See § 1441 “defendant” (not “counter-defendant”) removes

- if D brings the counterclaim, may D remove?

* No. See *Mottley*.
* Counterclaims are not a basis for removal. Otherwise, it would be too easy to get into federal court by drumming up a counterclaim under federal law.
* Officer P knows that he is likely to be sued under federal civil rights law by D, someone he arrested  
    
  he feels that a state court would be more favorable to him than a federal court  
    
  how might P use the compulsory counterclaim rule (assuming it applies in state court) to ensure a state court forum for D’s federal civil rights action?
* The officer in the hypo can race the potential civil rights claimant to the courthouse and file his battery claim first in order to force the claimant to litigate in state court with the comp CC rule
* As long as the applicable frivolousness rule is satisfied, this is acceptable.

What about when the pre-answer motion disposes of the claim?

P sues D in federal court concerning negligence   
•    D makes pre-answer motion to dismiss for failure to state a claim   
•    D’s motion is granted  
•    subsequently D sues P in federal court concerning negligence in connection with the same accident  
•    P asserts defense that D is precluded from bringing action because it was a compulsory counterclaim in the earlier suit  
•    barred?

* Counterclaims are not precluded. See compulsory counterclaim rule (13(a)).
* A pre-answer motion is not a “pleading.”

When you answer the complaint, and the action is dismissed, make sure not to waive compulsory counterclaims. Make sure that the court dismisses the counter-claims **without** prejudice.

better yet use a preanswer motion and avoid answering entirely

- P (NY) sues D (Cal) in federal court in Cal concerning a battery that the two got into in NY  
- D counterclaims concerning breach of an unrelated contract that took place solely within NY  
- P brings a motion to dismiss the counterclaim for lack of PJ  
- what result?

notice this is a permissive CC

* In the case of a **compulsory** counterclaim, there is personal jurisdiction over the plaintiff on the counterclaim. P filed in California, so there is personal jurisdiction over him for D’s CC for damages from the NY brawl.
* However, on **permissive** counterclaims, this is somewhat of an open question. Compulsory counterclaims are easy, but permissive ones are more complicated. Green inclined to say yes jurisdiction is constitutional, but should not be allowed as a practical matter. Consider hypo where defendant on ten-cent claim counterclaims for ten billion dollars.

Personal jurisdiction and counterclaims

- assume that P sues D for battery in federal court  
- D answers, asserting the defense of lack of PJ and joins a counterclaim for his own damages in the brawl  
- P argues that D has waived defense of PJ by counterclaiming - result?

Remember the uber-special appearance. See 12(b), stating no defense waived by joining it with other ones. This is an open question because 12(b) does not mention counterclaims. Majority view: there is no waiver by virtue of bringing up a counterclaim.

However, what about when defendant mentions a permissive counterclaim? Open question whether this waives the objection to personal jurisdiction.