Civil Procedure
Fall 2018
Professor Lonny Hoffman

Section 3

Rule 15
Questions for Discussion

1. What is the first question to ask with any amendment problem?

2. To what documents does Rule 15(a)(1)(A) apply? What about Rule 15(a)(1)(B)?

3. When is an amendment allowed under Rule 15(a)(1)(A) and (B)?

4. When must you look to Rule 15(a)(2)?

5. What is the standard the court uses to decide if leave should be granted to amend under Rule 15(a)(2)?

6. Can you explain the different treatment by courts of the Rule 15(a)(2) standard?

7. P files her complaint and serves D on same day. D timely files an answer. Eighteen days later, D realizes she failed to assert lack of personal jurisdiction as a defense in her answer. What may D do?

8. P files her complaint and serves D on same day. D timely files an answer. A month later, D realizes she failed to assert an affirmative defense in her answer. What may D do?

9. Assuming that there may be a limitations problem, what's the next step under Rule 15?

10. When can you use Rule 15(c)(1)(A)?

11. To what does Rule 15(c)(1)(B) apply? How have courts interpreted Rule 15(c)(1)(B)?

12. To what does Rule 15(c)(1)(C) apply? How have courts interpreted Rule 15(c)(1)(C)?

13. What portion of Rule 15 was the Supreme Court interpreting in *Krupski* and what is the case's holding?

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ON TRACK INNOVATIONS LTD.,	12 Civ. 2224 (AJN) (JCF)
Plaintiff,	MEMORANDUM AND ORDER
- against -	Jan 31, 2014
T-MOBILE USA, INC.,	
Defendant.	
T-MOBILE USA, INC.,	
Counter Claimant,	
- against -	
ON TRACK INNOVATIONS LTD.,	
Counter Defendant.	

JAMES C. FRANCIS IV
UNITED STATES MAGISTRATE JUDGE

Pursuant to Rule 15(a)(2) of the Federal Rules of Civil Procedure, the plaintiff in this patent infringement action, On-Track Innovations ("OTI"), seeks leave to amend its complaint to include claims of active inducement of patent infringement under 35 U.S.C. § 271(b). (On Track Innovations Ltd.'s Memorandum in Support of its Motion for Leave to File Amended Complaint ("Pl. Memo.")). The defendant, T-Mobile USA, Inc. ("T-Mobile"), opposes the motion, arguing that it is untimely, prejudicial, made in bad faith, and ultimately futile. (T-Mobile's Opposition to OTI's Motion for Leave to File Amended Complaint ("Def. Memo.")). For

the following reasons, the motion is granted.

Background

This action arises from a patent dispute involving new cellular telephone technology "employing both contact and contactless modes of communication, such as so-called 'hybrid' smart cards." (Memorandum and Order dated June 20, 2013 at 3). Certain cell phones are equipped with a feature -- Near Field Communications ("NFC") -- enabling them to establish peer-to-peer radio communications with nearby devices. NFC-capable phones can communicate with other electronic devices in their proximity without needing physical contact; for instance, the user of an NFC-capable cell phone can turn on his nearby stereo through his cell phone. OTI is the owner of U.S. Patent No. 6,045,043 ("the '043 Patent"), which "deals with connecting a microprocessor with both the contact and contactless modes of communication through separate, dedicated lines of connection," obviating the need for a switching device between the two. (Order at 3).

The plaintiff filed its original complaint on March 26, 2012, claiming that T-Mobile's NFC-capable devices directly infringe its patent. In October 2012, T-Mobile did a pilot launch of the ISIS Mobile Wallet, a method of contactless payment using NFC-capable phones in conjunction with enhanced SIM cards, in two major U.S. cities. (Def. Memo. at 4; Declaration of Ellisen S. Turner dated

Dec. 23, 2013, Exh. C). The national launch of T-Mobile's NFC program occurred in November 2013. (Pl. Memo. at 1-3; ISIS Mobile Wallet FAQ, attached as Exh. B to Amended Complaint, at 29). T-Mobile subscribers were informed, through T-Mobile's website, that they could visit T-Mobile stores to receive Advanced SIM cards for use in their NFC-capable cellular phones. (Pl. Memo. at 1-3; ISIS Mobile Wallet FAQ at 29). OTI now seeks to amend its complaint to allege that, by inviting its customers to obtain an Advanced SIM card for insertion into an NFC-capable cell phone, T-Mobile was "actively inducing infringement of the patent." (Pl. Memo. at 1).

Discussion

Rule 15 of the Federal Rules of Civil Procedure provides that leave to amend a pleading should be freely granted "when justice so requires." Fed. R. Civ. P. 15(a)(2); see also Foman v. Davis, 371 U.S. 178, 182 (1962); Aetna Casualty & Surety Co. v. Aniero Concrete Co., 404 F.3d 566, 603-04 (2d Cir. 2005); Carrion v. Singh, No. 12 CV 0360, 2013 WL 639040, at *11 (E.D.N.Y. Feb. 21, 2013). Under this liberal standard, motions to amend should be denied only for reasons of undue delay, bad faith or dilatory motive, undue prejudice to the non-moving party, or futility. See Burch v. Pioneer Credit Recovery, Inc., 551 F.3d 122, 126 (2d Cir. 2008) (citing Foman, 371 U.S. at 182); McCarthy v. Dun & Bradstreet Corp., 482 F.3d 184, 200 (2d Cir. 2007); In re Alcon Shareholder

Litigation, 719 F. Supp. 2d 280, 281-82 (S.D.N.Y. 2010). The same standard applies when the party seeks to supplement the complaint with events that happened after the date of the original pleading. See Fed. R. Civ. P. 15(d); In re American International Group, Inc. Securities Litigation, No. 04 Civ. 8141, 2008 WL 2795141, at *3 (S.D.N.Y. July 18, 2008) (noting that pleading is technically "supplemental pleading" but that the standard of Rule 15(a) governs). The court has broad discretion over such motions. See McCarthy, 482 F.3d at 200; Biosafe-One, Inc. v. Hawks, 639 F. Supp. 2d 358, 370 (S.D.N.Y. 2009).

Generally, "[w]hen deciding issues in a patent case, a district court applies the law of the circuit in which it sits to nonpatent issues and the law of the Federal Circuit to issues of substantive patent law." Paone v. Microsoft Corp., 881 F. Supp. 2d 386, 393-94 (E.D.N.Y. 2012) (internal quotation marks omitted); see also In re Bill of Lading Transmission and Processing System Patent Litigation, 681 F.3d 1323, 1331 (Fed. Cir. 2012) (applicable law of regional circuit is applied to motions to dismiss for failure to state a claim in patent cases).

A. Delay

In the Second Circuit, a court may deny a motion to amend "where the motion is made after an inordinate delay, no satisfactory explanation is offered for the delay, and the

an induced infringement claim against T-Mobile. According to OTI, the national launch was the first time that T-Mobile itself invited subscribers to obtain new Advanced SIM cards for their NFC cellular phones. (On Track Innovations LTD.'s Reply in Support of its Motion for Leave to File Amended Complaint ("Pl. Reply") at 3). Under these circumstances, there is no undue delay. See TNS Media Research, LLC v. TRA Global, Inc., No. 11 Civ. 4039, 2012 WL 2052679, at *1 (S.D.N.Y. June 4, 2012) (allowing party to add counterclaim defendants where earlier suspicions were subsequently borne out through discovery); Optigen, LLC v. International Genetics, Inc., 777 F. Supp. 2d 390, 400 (N.D.N.Y. 2011) (allowing amendment where "the new allegations, including those giving rise to the newly asserted cause of action, were facts of which Plaintiff did not become aware until some point during discovery"). Indeed, even if OTI had not offered a satisfactory explanation for the one-year delay after the October 2012 pilot launch, courts have allowed amendment after much longer periods of delay. See, e.g., Commander Oil Corp. v. Barlo Equipment Corp., 215 F.3d 321, 333 (2d Cir. 2000) (no abuse of discretion in grant of leave to amend after seven year delay, in absence of prejudice); Rachman Bag Co. v. Liberty Mutual Insurance Co., 46 F.3d 230, 235 (2d Cir. 1995) (leave to amend properly granted after four-year delay); Block, 988 F.2d at 350-51 (amendment allowed four years after complaint

amendment would prejudice other parties." Grace v. Rosenstock, 228 F.3d 40, 53-54 (2d Cir. 2000) (internal quotation marks omitted); accord State Farm Mutual Automobile Insurance Co. v. Grafman, No. 04 CV 2609, 2007 WL 7704666, at *3 (E.D.N.Y. May 22, 2007). However, "[m]ere delay, . . . absent a showing of bad faith or undue prejudice, does not provide a basis for a district court to deny the right to amend." Block v. First Blood Associates, 988 F.2d 344, 350 (2d Cir. 1993) (internal quotation marks omitted); see also Rotter v. Leahy, 93 F. Supp. 2d 487, 497 (S.D.N.Y. 2000) ("Typically, the moving party's delay, standing alone, is not sufficient reason to foreclose amendment.").

The plaintiff seeks to add a new claim twenty months after the filing of its original complaint. However, this new allegation centers on T-Mobile's November 2013 national launch of its NFC program, rather than on activities taking place at the time the action was commenced. T-Mobile argues that OTI was aware of similar activities -- namely, its October 2012 pilot launch of the NFC program -- at least one year earlier, and that this constitutes undue delay. (Def. Memo. at 3-5). However, as far as OTI knew at the time of the pilot launch, the only suggestions that customers insert Advanced SIM cards into NFC-capable phones came from an independent blogger and an ISIS press release, not from T-Mobile, and thus OTI did not then possess facts that could have supported

filed).

B. Prejudice

"[P]rejudice alone is insufficient to justify a denial of leave to amend; rather the necessary showing is 'undue prejudice to the opposing party.'" A.V. by Versace, Inc. v. Gianni Versace S.p.A., 87 F. Supp. 2d 281, 299 (S.D.N.Y. 2000) (emphasis in original) (quoting Foman, 371 U.S. at 182). In deciding whether undue prejudice exists, courts should consider whether the new claim would "'(i) require the opponent to expend significant additional resources to conduct discovery and prepare for trial; (ii) significantly delay the resolution of the dispute; or (iii) prevent the plaintiff from bringing a timely action in another jurisdiction.'" Monahan v. New York City Department of Corrections, 214 F.3d 275, 284 (2d Cir. 2000) (quoting Block, 988 F.2d at 350); Zoll v. Jordache Enterprises Inc., No. 01 Civ. 1339, 2002 WL 485733, at *1 (S.D.N.Y. March 29, 2002). This "inquiry involves a balancing process," weighing any potential prejudice to the opposing party against the prejudice that the moving party would experience if the amendment were denied. Oneida Indian Nation of New York v. County of Oneida, 199 F.R.D. 61, 77 (N.D.N.Y. 2000).

T-Mobile claims that introducing a theory of induced infringement after fact discovery has closed prevents them from

obtaining relevant evidence for their defense. T-Mobile contends that without previous notice of induced infringement claims, it had no reason to seek an opinion of counsel letter, which the Federal Circuit recognizes as probative of lack of intent. See Bettcher Industries, Inc. v. Bunzl USA, Inc., 661 F.3d 629, 649 (Fed. Cir. 2011) (finding opinion of counsel regarding non-infringement "admissible, at least with respect to [defendant]'s state of mind and its bearing on indirect infringement"). Because expert discovery has not yet closed, there is no reason that this evidence cannot now be obtained.

T-Mobile's prejudice argument goes one step further, and argues that any opinion it obtains now will, at trial, be argued to be untimely. (Def. Memo. at 8). However, while OTI is free to argue that an opinion of counsel letter obtained after the allegedly infringing acts is immaterial to T-Mobile's intent at the time, it is statutorily barred from arguing that any failure to obtain the advice of counsel with respect to the '043 Patent is probative of T-Mobile's intent to induce infringement. 35 U.S.C. § 298 ("The failure of an infringer to obtain the advice of counsel with respect to any allegedly infringed patent, or the failure of the infringer to present such advice to the court or jury, may not be used to prove that the accused infringer willfully infringed the patent or that the infringer intended to induce infringement of the

patent.").

T-Mobile has not identified any way in which the amendment would require significant additional discovery. To be sure, a claim of induced infringement requires proving elements of knowledge and specific intent that are not required in a direct infringement claim, and T-Mobile complains that it has not had the opportunity to elicit any evidence of intent.[1] However, the defendant "should have accessible to it the evidence bearing on its own state of mind." Perfect Pearl Co., Inc. v. Majestic Pearl & Stone, Inc., 889 F. Supp. 2d 453, 461 (S.D.N.Y. 2012). As the proposed amendment is not likely to "require [T-Mobile] to expend significant additional resources to conduct discovery and prepare for trial" or "significantly delay the resolution of the dispute," there is no undue prejudice. See Block, 988 F.2d at 350.

Similarly, there is no undue prejudice in the revised list of accused products in OTI's proposed amended complaint. Although T-Mobile states that three new accused devices are included for the first time (Def. Memo. at 14), OTI explains that this is due to the industry's regular updating of cell phone models, and the

[1] T-Mobile's contention that it needs fact discovery from the suppliers that designed the accused products "to confirm that they were not aware of the patent [and] did not intend their products to infringe" is baseless. (Def. Memo. at 14). At issue are T-Mobile's intent and actions, not the suppliers'.

underlying technical basis for claiming infringement remains the same (Pl. Reply at 8).

C. Bad Faith

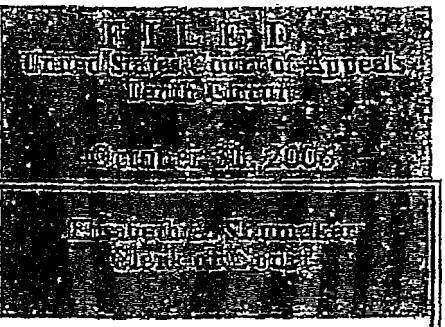
To the extent that T-Mobile raises a bad faith objection to OTI's motion, that assertion also fails. T-Mobile claims that, in what it deems an improper "quid pro quo," OTI refused to consent to T-Mobile's request to amend its answer unless T-Mobile allowed OTI to amend its complaint. (Def. Memo. at 5-6). This is now moot, as OTI has agreed to allow T-Mobile to amend its answer. (Pl. Reply at 9). Moreover, while there is little law in the Second Circuit on what constitutes bad faith in the context of a motion for leave to amend a pleading, see Oneida Indian Nation, 199 F.R.D. at 80, the precedent that exists indicates that the amendment itself must embody unfair strategic maneuvering, see, e.g., State Trading Corp. of India v. Assuranceforeningen Skuld, 921 F.2d 409, 417-18 (2d Cir. 1990) (denying motion to amend where plaintiff sought strategic advantage by reserving certain claims until after court's choice of law determination).

Conclusion

For the foregoing reasons, On Track Innovations' motion for leave to file an amended complaint (Docket no. 95) is granted.

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT



JULIE SPENCER, individually, and as Next Friend of A.H. and W.S., minors; CHRISTOPHER SPENCER, individually, and as Next Friend of A.H. and W.S., minors, Plaintiffs - Appellants, v. WAL-MART STORES, INC., a Delaware corporation, Defendant - Appellee.	No. 05-5157 (D.C. No. 02-CV-771-JOE) (N.D. Okla.)

ORDER AND JUDGMENT(*)

Before **LUCERO**, **EBEL**, and **O'BRIEN**, Circuit Judges.

Plaintiff Julie Spencer was struck by a vehicle while walking through an Oklahoma Wal-Mart parking lot. Following the incident, she and her husband, Chris Spencer, individually and as next friends for their minor children, brought a negligence claim against Wal-Mart. They argue Wal-Mart breached its duty to protect Ms. Spencer from the criminal act of a third party occurring on its property. Concluding Wal-Mart owed no duty to Spencers under Oklahoma law because, on its fact-finding, Wal-Mart did not "know or have reason to know that a criminal act was occurring or about to occur," the district court granted summary judgment in favor of Wal-Mart. We **AFFIRM**.

I

On October 3, 2001, Ms. Spencer and her husband went shopping at Wal-Mart Store No. 992, located in Tulsa, Oklahoma. Ms. Spencer and Mr. Spencer separated, with Ms. Spencer agreeing to meet her husband at their car after she finished browsing the garden department. When Ms. Spencer exited the store and approached her vehicle, a black, late-model sports car rapidly accelerated towards her from the rear, swerved into her path, and struck her with sufficient force to hurl her into the air. The assailant then sped out of the parking lot. Although no Wal-Mart employee witnessed the incident, its security cameras recorded the attack.(1) Police have been unable to identify a suspect based on the surveillance footage.

On October 4, 2002, Spencers filed a diversity action against Wal-Mart in federal court alleging state claims for negligence, gross negligence, willful disregard of duty, loss of consortium, and loss of

parental consortium. Wal-Mart moved for summary judgment, and the district court granted its motion. Spencers now appeal that order.

II

Spencers' Reply Brief was filed three days late, and Wal-Mart has moved to strike the brief as untimely. Conceding that the filing was untimely under Federal Rule of Appellate Procedure 31(a), Spencers ask us to excuse the delay because it was short-lived, Wal-Mart has not shown prejudice, and Spencers did not act in bad faith. We agree. Whether to excuse a late filing is within our discretion. See Burnham v. Humphrey Hospitality REIT Trust, Inc., 403 F.3d 709, 712 (10th Cir. 2005). Absent an allegation by the opposing party that it suffered prejudice because of the delay, we generally allow such filings. See, e.g., id. (holding that party could file brief approximately two months late). Given the short delay and absence of prejudice, Wal-Mart's motion to strike the reply brief is denied. We do, however, expect Spencers to comply with future deadlines.

III

Spencers contend that the district court abused its discretion in granting summary judgment to Wal-Mart before ruling on their pending motion for leave to file an amended complaint. During a hearing on the summary judgment motion, the district court informed the parties it would defer ruling on Spencers' motion to amend until after deciding Wal-Mart's summary judgment motion. Following the hearing, however, the district court granted summary judgment in favor of Wal-Mart without ruling on Spencers' request for amendment. Both parties consider this a denial of Spencers' motion, as do we.

We review a district court's denial of a motion to amend for abuse of discretion. Woolsey v. Marion Labs., Inc., 934 F.2d 1452, 1462 (10th Cir. 1991). Federal Rule of Civil Procedure 15(a) provides that a party may amend its complaint "only by leave of court or by written consent of the adverse party." Because Wal-Mart did not consent, Spencers were required to obtain leave from the court. "Although such leave shall be freely given when justice so requires, whether to grant such leave is within the discretion of the trial court." First City Bank N.A. v. Air Capitol Aircraft Sales, Inc., 820 F.2d 1127, 1132 (10th Cir. 1987) (internal citations and quotations omitted). Leave may properly be denied

by the district court if it finds "undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, [or] futility of amendment." Foman v. Davis, 371 U.S. 178, 182 (1962). Conversely, "outright refusal to grant [] leave without any justifying reason appearing for the denial is not an exercise of discretion; it is merely abuse of that discretion and inconsistent with the spirit of the Federal Rules." Id.

Assuming it was error for the court below not to state "justifying reasons" for the implicit denial, this error is harmless if the "record contains an apparent reason [for] justifying the denial of a motion to amend" regardless of what the district court relied upon. Lambertsen v. Utah Dept. of Corr., 79 F.3d 1024, 1029 (10th Cir. 1996). Based on our independent review of the record, we conclude that Spencers' delay in filing a request to amend was unwarranted.

We recognize delay alone should not justify denial of leave to amend. Minter v. Prime Equip. Co., 451 F.3d 1196, 1205 (10th Cir. 2006). In determining whether the delay was undue, we consider both the length of the delay and the reason for its occurrence. Id. at 1205-06. Here, the delay was substantial. Spencers filed their motion to amend seventeen months after filing their initial complaint and shortly before trial was scheduled to begin.

We fail to see a reason for the delay. Their claim for deceit and their assumption of duty theory of negligence,[2] both based on Wal-Mart's allegedly fraudulent representation that it was monitoring its video cameras, have been evident throughout the proceedings. Facts necessary to support these claims were known or should have been known to the Spencers at the time the original complaint was filed, and were clearly known to them at the time they filed their response to Wal-Mart's summary judgment motion seven months before filing their motion to amend.[3]

We do not intend to impose upon plaintiffs a burden to immediately advance a claim upon notice of facts sufficient to support it. Litigants are allowed reasonable time to analyze information and make strategic decisions. Spencers have failed, however, to provide any legitimate justification for the substantial delay. As such, their motion to amend the complaint was undue, making the district court's error in failing to address that motion harmless. See Evans, 936 F.2d at 1091 ("[T]he liberalized pleading rules [do not] permit plaintiffs to wait until the last minute to ascertain and refine the theories on which they intend to build their case."); Fed. Ins. Co. v. Gates Learjet Corp., 823 F.2d 383, 387 (10th Cir. 1987) (holding delay was undue when "the moving party was aware of the facts on which the amendment was based for some time prior to the filing of the motion to amend").[4]

The 2009 AMENDMENT TO FEDERAL RULE 15(a)(1) - A STUDY IN AMBIGUITY

SUSAN E. HAUSER*

A. *A Brief History of Amendments to Pleadings*

Historically, amendments to pleadings have been available in common law procedural systems with a level of ease that bears an inverse relationship to the importance of pleadings within the procedural system itself.[34] Until the middle of the Fourteenth Century, English common law used a system of oral pleading in which "the parties or their counsel were permitted to change or adjust their pleadings as the oral altercation proceeded, and were not held to any specific form of allegation put forward."[35] With the advent of written pleadings, formalism increased and amending became simultaneously more difficult,[36] with the result that "by the 14th and 15th centuries . . . abuses grew up and cases were constantly thrown out of court and judgments arrested and reversed for errors of form."[37] These abuses were caused by an intricate system of writ pleading in which "pleading in practice degenerated into a baleful game of skill" used to cabin the substantive rights, remedies, and defenses of the parties.[38]

In response, Parliament enacted a series of statutes, known as the Statutes of Jeofails, expressly providing for the acknowledgement and correction of errors in pleading.[39] Twenty separate Statutes of Jeofails were enacted in England between 1340 and 1852 to address particularized needs for amendment.[40] By 1875, English pleading procedures had sufficiently liberalized to allow parties one amendment, without leave, "at any time before the expiration of the time limited for reply and before replying, or, where no defence (sic) is delivered, at any time before the expiration of four weeks from the appearance of the defendant who shall have last appeared."[41]

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33. Alison Reppy, *Aider, Amendment and the Statutes of Jeofails – At Common Law, Under Modern Codes, Practice Acts and Rules of Civil Procedure – Pt. 1*, 6 AM. U. L. REV. 65, 66-67 (1957).

34. *Id.*

35. *Id.*

36. Charles E. Clark & Ruth A. Yerion, *Amendment and Aider of Pleadings*, 12 MINN. L. REV. 97, 97 (1928).

37. *Id.*

38. KEVIN M. CLERMONT, PRINCIPLES OF CIVIL PROCEDURE 17 (2005).

39. *Reppy, supra* note 33, at 68-69. For additional descriptions of the Statutes of Jeofails, *see, e.g., Clark & Yerion, supra* note 36; CHARLES E. CLARK, HANDBOOK OF THE LAW OF CODE PLEADING 703-05 (West Publishing Co. 2d ed. 1947) [hereinafter HANDBOOK].

40. *Reppy, supra* note 33, at 78-90. The wooden nature of the system of writ pleading used in England during this period made a sequence of statutes necessary to cure problems as they developed and were recognized. *Id.*

41. *Clark & Yerion, supra* note 36, at 100, n.14 (quoting 38 & 39 Vict., 1st Schedule, Rules of Court, Order 28, Rule 2; Annual Practice 1927). Until the 2009 amendment, Federal Rule 15(a) effectively tracked these rules of pleading amendment.

This developing structure, which was further complicated by the historic division between the English common law and equity systems,[42] was transplanted to the United States and to other countries colonized by the British.[43] In the United States, federalism added yet another layer of complexity, with separate systems of law and equity employed at the federal level and joined by a welter of different state systems of law and equity.[44] In the Nineteenth Century, David Dudley Field began a procedural reform movement in the United States that called for the merger of law and equity into "one form of action"[45] with one merged and simplified set of procedural rules.[46] The Field Code, which was first adopted in New York in 1848 and then rapidly spread to other states, drew on equity practice to liberalize the procedures for pleading, pleading amendments, and the rules for joinder of claims and parties.[47]

The classic analysis of code pleading in the United States is found in Charles E. Clark's *Handbook of the Law of Code Pleading*, originally published in 1928.[48] In his *Handbook*, Judge Clark notes that:

> In many codes, a whole chapter is given to amendments, and generally in the others numerous sections are devoted to the subject. In practically all states, [sic] there are also statutes dealing with the effect of variance between pleading and proof. The statutes on amendments provide first for amendments without leave of court if made within a certain period, and second, for amendments by permission of the court.[49]

Judge Clark describes statutes to this effect in twenty-eight different states and territories.[50] To illustrate amendments without leave, he

42. *See, e.g.*, Stephen M. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909 (1987) (describing the English division between common law courts and equity courts).

43. *See, e.g.*, CLERMONT, *supra* note 38, at 5-26 (2005).

44. *Id.* at 26 ("The American states basically followed the English model until the code reforms of the 1800s.").

45. Thomas O. Main, *Traditional Equity and Contemporary Procedure*, 78 WASH. L. REV. 429, 465 (2003) (citing N.Y. LAWS, c. 510 § 62 (71st Sess., Apr. 12, 1848)).

46. Main, *supra* note 45, at 466-67.

47. Main, *supra* note 45, at 467.

48. HANDBOOK, *supra* note 39, at 708. Charles E. Clark became Dean of Yale Law School in 1929 and in 1935 became Reporter of the Advisory Committee that drafted the Federal Rules of Civil Procedure. Clark was subsequently appointed to serve as a federal appellate judge on the Second Circuit Court of Appeals. Fred Rodell, *For Charles E. Clark: A Brief and Belated but Fond Farewell*, 65 COLUM. L. REV. 1323, 1323 (1965). "With justification, Clark has been called the 'prime instigator and architect of the rules of federal civil procedure.'" Subrin, *supra* note 42, at 961 (*quoting* Rodell, *supra*). *See generally* Charles E. Clark, *Preface to* PROCEDURE – THE HANDMAID OF JUSTICE: ESSAYS OF CHARLES E. CLARK (C. Wright & H. Reasoner eds., 1965) (containing an excellent biography of Judge Clark).

49. HANDBOOK, *supra* note 39, at 708.

50. HANDBOOK, *supra* note 39, at 708 nn.28-29.

used a Montana statute that bears a remarkable similarity to the original version of Federal Rule 15(a) adopted ten years later in 1938:

> Any pleading may be amended once by the party of course, and without costs, at any time before answer or demurrer filed or twenty days after demurrer and before the trial of the issue thereon, by filing the same as amended and serving a copy on the adverse party, who may have twenty days thereafter in which to answer, reply or demur to the amended pleading.[51]

Judge Clark's discussion and summary of state statutes shows that by 1928, lawyers in the United States were already accustomed to the idea that pleadings could be amended as a matter of course.

Before the adoption of the Federal Rules, federal courts were required to follow state procedure in cases at law,[52] but applied a uniform set of federal procedural rules in equity cases.[53] As a result, federal courts used two separate sets of procedural rules for cases at law and equity until the Federal Rules of Civil Procedure were adopted and explicitly merged law and equity into "one form of action."[54] The Federal Rules of Civil Procedure ultimately adopted in 1938 represent a blend of then-available procedures that drew from equity to greatly liberalize pleading and discovery in ways that ultimately "open[ed] the way for plaintiffs to explore and expand new frontiers of substantive liability . . . ."[55]

As a major component of these reforms, the Federal Rules of Civil Procedure established a uniform pleading system for use in all civil cases filed in federal court.[56] Federal Rule 8 implemented a flexible system of notice pleading that, when coupled with the expanded dis-

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51. HANDBOOK, *supra* note 39, at 708-09 (quoting Mont. Rev. Codes Ann., Anderson & McFarland, 1935, § 9186.)

52. *See Main*, *supra* note 45, at 470 (describing the federal Conformity Acts that required federal courts to follow state procedure in law cases).*See* Stephen Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015, 1040 (1982).

53. *Burbank*, *supra* note 52, at 1039 ("In all states, it remained necessary for lawyers practicing in federal court to master a discrete federal equity procedure.").

54. *Subrin*, *supra* note 42, at 920. *See* FED. R. CIV. P. 2. (There is one form of action —the civil action.").

55. Richard L. Marcus, *Of Babies and Bathwater: The Prospects for Procedural Progress*, 59 BROOK. L. REV. 761, 783, 785 (1993).

56. *See* Charles E. Clark & James Wm. Moore, *A New Federal Civil Procedure: II. Pleadings and Parties*, 44 YALE L.J. 1291 (1935) (describing the development of the pleading rules that would be adopted three years later in the Federal Rules of Civil Procedure). Clark and Moore emphasized the need for uniformity in federal procedure by describing the status of federal procedure under the Conformity Act that required each federal court to conform procedure in law cases to applicable state procedure. "Under the present system the Conformity Act controls actions at law so that the federal attitude toward the pleadings in law actions is determined by that of the state where the federal district court is sitting. Thus pleadings have been construed strictly in some states and liberally in others; and amendments have been refused, permitted, or deemed immaterial when not made, in general accord with the attitude of the applicable state practice toward variance and failure of proof." *Id.* at 1299-1300.

covery mechanisms provided in Rules 26-37 and the provision for summary judgment in Rule 56, de-emphasized the importance of pleading by allowing parties to develop "elements of proof" after the pleadings were complete.[57]

Although it was no longer necessary or possible for the parties to forecast the structure of pending litigation with complete accuracy in their pleadings, the pleadings remained the key roadmap to the claims, defenses, and issues joined in any particular case.[58] As a result, the reduced role of pleading under the Federal Rules paradoxically increased the importance of amendments to pleadings.[59] As initial pleadings grew less informative, it became imperative that the Federal Rules allow parties to freely amend their pleadings to correct mistakes, add or subtract claims, defenses, or parties, and conform the pleadings to the proof actually developed in the case.[60] As a result, the system of amendment allowed in Federal Rule 15(a) was created.

B. *The Mechanics of Amending Pleadings "As a Matter of Course" before December 2009*

The Federal Rules of Civil Procedure set up a litigation structure in which "the preliminary paper pleadings in advance of trial" assume a "subordinate character."[61] To facilitate this system, Rule 15 was drafted to allow pleadings to be amended sometimes as a matter of course and, otherwise, whenever "justice so requires."[62] The liberal character of Rule 15 is best illustrated by Rule 15(b), allowing for amendments during and after trial to match the evidence presented and issues actually tried, and Rule 15(c), allowing certain amendments

57. This view of the relationship between pleading, discovery, and summary judgment is so commonly accepted today as to be axiomatic. However, it was the product of deliberate study and planning by the framers of the Federal Rules. *See, e.g.*, Charles E. Clark, *The Handmaid of Justice*, 23 WASH. U.L.Q. 297, 318 (1938) ("Attempted use of the pleadings as proof is now less necessary than ever with the development of two devices to supply such elements of proof as may be necessary before trial. These are discovery and summary judgment, both the subject of extensive provisions in the new rules.").

58. *See* FED. R. CIV. P. 8 (requiring pleadings to provide "short and plain" statements of claims for relief, defenses, and responsive positions).

59. Charles E. Clark, *Simplified Pleading*, 2 F.R.D. 456, 467 (1943) [hereinafter *Simplified Pleading*] ("In the pleading system here visualized, the rule of amendment must, of course, assume great importance.") *Simplified Pleading* was published after Judge Clark was appointed to the Second Circuit Court of Appeals and presents the interesting perspective of a judge who is now called upon to execute the system of rules that he played a principal role in shaping and drafting.

60. *Clark & Moore*, *supra* note 56, at 1300-01 (linking amendments to pleading objectives and noting that "amendment should be freely had, for nothing is to be gained under a unified procedure in forcing the parties to start over").

61. *Simplified Pleading*, *supra* note 59, at 467.

62. FED. R. CIV. P. 15(a)(2). Of course, pleadings may also be amended at any time with the written consent of the opposing party. *Id.*

to relate back to the filing of the original pleading after the expiration of the statute of limitations.[63] Rule 15(d) goes a step further and permits the court "on just terms" to allow parties to serve supplemental pleadings adding transactions occurring *after* the date of the original pleading, "even though the original pleading is defective in stating a claim or defense."[64]

The framers of the Federal Rules consciously intended to promote amendments and included a number of other Federal Rules that reinforce the ability of parties to amend pleadings by preventing dismissal or reversal for "matters not going to substance."[65] In their original form, these included:

> Rule 1, requiring the construction of the rules 'to secure the just, speedy, and inexpensive determination of every action'; Rule 4(h) [now 4(a)(2)], for amendment of process or proof of service; Rule 8(f) [now 8(e)], . . . as to the construction of pleadings; and Rule 60(b) [now 60(b)(1)], providing for relief to a party from an action taken against him 'through his mistake, inadvertence, surprise, or excusable neglect.' This is followed by a definite general rule, 61, as to harmless error, providing against reversal, 'unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.'[66]

Taken as a whole, these rules very clearly express their drafters' view that pleading defects should not prevent the court from adjudicating a case on the merits.[67]

Within this system, Rule 15(a) provides the general rules for the amendment of pleadings, with Rule 15(a)(1) providing for amendments as a matter of course, and Rule 15(a)(2) addressing all other amendments. Until the December 1, 2009 amendment, Rule 15(a)(1) allowed any party to amend a pleading once as a matter of course before being served with a responsive pleading[68] or within 20 days after serving the pleading if a responsive pleading was not allowed and the action was not yet on a trial calendar.[69]

This rule drew a clean and unambiguous line between the pleadings governed by subsections (A) and (B), with Rule 15(a)(1)(A) applying

63. FED. R. CIV. P. 15(b)- (c).
64. FED. R. CIV. P. 15(d).
65. *Simplified Pleading, supra* note 59, at 468.
66. *Simplified Pleading, supra* note 59, at 468.
67. *Simplified Pleading, supra* note 59, at 468. Congress reinforced this policy in 1948 by adopting 28 U.S.C. § 1653 which reads "Defective allegations of jurisdiction may be amended, upon terms, in the trial or appellate courts." 28 U.S.C. § 1653 (2010).
68. FED. R. CIV. P. 15(a)(1)(A) (2009) (amended 2009).
69. FED. R. CIV. P. 15(a)(1)(B) (2009) (amended 2009).

only to pleadings that themselves demand a responsive pleading.[70] By definition, this is the universe of pleadings that state claims for relief – including the complaint, counterclaims, cross-claims, and third-party complaints.[71] The rule allowed these pleadings to be amended once as a matter of course until the pleader was served with a responsive pleading.[72] Because motions are not responsive pleadings, the right to amend under this version of Rule 15(a)(1)(A) was not terminated by the filing of any motion, including the ubiquitous motions for extensions of time and Rule 12(b) motions to dismiss.[73] As a result, the rule created the possibility that the plaintiff's right to amend the complaint as a matter of course could extend for considerably longer than the twenty-day period for filing a responsive pleading then provided by Rule 12(a).[74]

Before the 2009 amendment, it was equally clear that pleadings that do not require a responsive pleading were governed by Rule 15(a)(1)(B). By definition, the pleadings governed by subsection (B) would thus be responsive pleadings that did not themselves state a claim for relief – including answers to complaints, counterclaims, cross-claims, and third-party complaints.[75] The rule strictly limited the time for as of course amendments to these responsive pleadings to a mere twenty days from the date that the responsive pleading was served.[76] This short time limit reflected the fact that these pleadings would never need to be amended to adjust to points made in a responsive pleading.[77]

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70. *Simplified Pleading, supra* note 59, at 468.

71. FED. R. CIV. P. 7(a).

72. FED. R. CIV. P. 15(a)(1)(A).

73. FED. R. CIV. P. 6(b), 12(b). *See, e.g.*, Smith v. Blackledge, 451 F.2d 1201 (4th Cir. 1971) (defendant's motion to dismiss was not a responsive pleading); Winget v. JP Morgan Chase Bank, N.A., 537 F.3d 565 (6th Cir. 2008) (same); Foster v. DeLuca, 545 F.3d 582 (7th Cir. 2008) (same); Coventry First, LLC v. McCarty, 605 F.3d 865 (11th Cir. 2010) (same). It is fair to characterize Rule 12(b) motions to dismiss as ubiquitous in federal litigation. A recent empirical study from the Administrative Office of U.S. Courts shows that at least one Rule 12(b) motion to dismiss was filed in 68% of all federal cases during two periods of comparison in 2007 and 2009-10. *See Motions to Dismiss Information on Collection of Data*, U.S. COURTS, (Apr. 13, 2010), - http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Motions%20to%20Dismiss_042710.pdf (comparing the nine months preceding *Twombly* with the nine months after *Iqbal*).

74. In a typical case, the Rule 15(a)(1) period for amending the complaint would extend for several months, but it is possible to find cases in which it lasted for much longer. *See, e.g., Winget*, 537 F.3d 565; Stein v. Royal Bank of Canada, 239 F.3d 389 (1st Cir. 2001); State Capital Title Abstract Co. v. Pappas Bus. Servs., LLC, 646 F. Supp. 2d 668 (D.N.J. 2009) (original complaint filed on July 25, 2008, followed by first amended complaint on December 11, 2008).

75. FED. R. CIV. P. 7(a).

76. FED. R. CIV. P. 15(a)(1)(B).

77. This reasoning remains apparent in the strictly limited time for as of course amendments to responsive pleadings under amended Rule 15.

The vast majority of courts have viewed the right to amend as of course under Rule 15(a)(1) as an absolute right,[78] whose existence is justified on the grounds of judicial economy and the unlikelihood of prejudice to opposing parties.[79] Rule 15(a)(1) assumes that it would be wasteful to require judicial involvement in these amendments because a judge would be highly unlikely to deny an amendment advanced so early in the case.[80] However, this logic breaks down in actual practice - particularly in complex litigation - and much of the impetus for amending Rule 15(a)(1) came from federal judges themselves.[81]

C. *Shortfalls in the Process: The Reasons Behind the December 2009 Amendment*

Amendments to the Federal Rules of Civil Procedure originate with a recommendation from the Civil Rules Advisory Committee to the Judicial Conference's Committee on Rules of Practice and Procedure[82] and are the product of a deliberative process that is comprehensively documented in the Advisory Committee's Minutes and Reports.[83] As a result, the Advisory Committee Minutes and Reports leading up to the 2009 amendment to Rule 15(a)(1) provide a reliable

78. *See supra* note 32 and accompanying text. Despite the clarity of the rule, a few decisions in cases filed by pro se prisoners hold that "[e]ven when a party may amend as a matter of course, leave to amend may be denied if there is bad faith, undue prejudice to the opposing party, or futility of amendment." Abebe v. Richland County, No. 2:09-2469-MBS, 2010 WL 2431062, at *5 (D.S.C. June 14, 2010) (citing United States v. Pittman, 209 F.3d 314 (4th Cir. 2000)) (refusing to allow as of course amendment adding a time-barred claim in a case seeking post-conviction relief). These decisions take the liberty of importing the Supreme Court's analysis for denying leave to amend under Rule 15(a)(2) into Rule 15(a)(1). *See* Foman v. Davis, 372 U.S. 178 (1962) (holding that leave to amend should be freely given in the absence of undue delay, bad faith, or undue prejudice to opposing party).

79. 6 CHARLES ALAN WRIGHT, ARTHUR R. MILLER, MARY KAY KANE & RICHARD L. MARCUS, FEDERAL PRACTICE AND PROCEDURE § 1480 (3d ed. 1990).

80. *Id.*

81. *See infra* Part I.C.

82. Pursuant to 28 U.S.C. § 2074(a), Congress retains ultimate authority over all federal rules; however, Congress delegated practical responsibility for federal rulemaking to the Supreme Court in the Rules Enabling Act. 28 U.S.C. § 2072. The Supreme Court, in turn, has delegated its rulemaking responsibility to the Judicial Conference of the United States, which maintains a standing Committee on Rules of Practice and Procedure (the "Standing Committee"). 28 U.S.C. § 2073(b). 28 U.S.C. § 2073(a)(2) authorizes the Judicial Conference to appoint Advisory Committees to assist the Standing Committee with rules of federal civil, criminal, appellate, and bankruptcy procedure, as well as with federal rules of evidence. Members of the Standing and Advisory Committees are drawn from the bench, practicing bar, and academia. A concise summary of the federal rulemaking process is available on the United State Courts website published by the Administrative Office of U.S. Courts, http://www.uscourts.gov/RulesAndPolicies/FederalRulemaking/RulemakingProcess.aspx.

83. The Reports and Minutes of the Civil Rules Advisory Committee are available at the website of the Administrative Office of U.S. Courts, http://www.uscourts.gov/uscourts/RulesAndPolicies.

guide to the procedural problems that led the Committee to propose changes to the rule. These materials show that the prior version of Rule 15(a)(1) was the target of criticism from the defense bar because of perceived plaintiff-bias,[84] and was also criticized by federal trial judges who expressed "irritation . . . over the experience of encountering an amended complaint filed after submission of a motion to dismiss."[85] Both sets of concerns indicate that dissatisfaction with the existing rule was focused on its use by the plaintiffs' bar.[86]

The first and foremost source of frustration was the "seemingly odd provision in [former] Rule 15(a) that cut[ ] off the right to amend once as a matter of course on the filing of a responsive pleading but not on the filing of a responsive motion."[87] Judges found this distinction unnecessary and wasteful because the right to amend survived "the motion, argument of the motion, deliberation by the court," and sometimes "even a decision granting the motion."[88] This allowed the plaintiff to test the court's response to the defendant's motion and file an amended complaint that not only addressed the court's concerns, but also benefitted from the judge's investment of research, court time, and effort in drafting an order.[89]

84. *See, e.g.*, COMMITTEE ON RULES OF PRACTICE AND PROCEDURE, *Report of the Civil Rules Advisory Committee*, U.S. COURTS, 8, (Dec. 12, 2006) http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/CV12-2006.pdf (addressing concerns from a "practitioner who primarily represents defendants").

85. *See, e.g.*, COMMITTEE ON RULES OF PRACTICE AND PROCEDURE, *Minutes: Civil Rules Advisory Committee, October 27-28, 2005*, U.S. COURTS, 10, (June 1, 2006) http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Minutes/CV11-2005-min.pdf ("Judges have suggested that this should be changed.").

86. *Id.* "Our discussions started with the belief that, as presently drafted, Rule 15(a) has resulted, in the usual context of a plaintiff desiring to amend the complaint, in both an unnecessary burden on district judges, and undue advantage to the plaintiff." *Report of the Civil Rules Advisory Committee, supra* note 84. *See also* COMMITTEE ON RULES OF PRACTICE AND PROCEDURE, *Minutes: Civil Rules Advisory Committee, May 22-23, 2006*, U.S. COURTS, 23, (June 1, 2006) http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Minutes/CV05-2006-min.pdf (noting that "important changes are recommended for [amendments to] a pleading to which a responsive pleading is required").

87. *Minutes: Civil Rules Advisory Committee, October 27-28, 2005, supra* note 85, at 9-10.

88. *Report of the Civil Rules Advisory Committee, supra* note 84, at 6. Unless the judge's order dismissed the case with prejudice, many courts held that the plaintiff retained the right to amend the complaint as a matter of course. *See, e.g.*, Richardson v. United States, 336 F.2d 265 (9th Cir. 1964) (plaintiff has the right to amend when defendant has successfully moved to dismiss but has not yet filed a responsive pleading); Hagee v. City of Evanston, 95 F.R.D. 344 (N.D. Ill. 1982) (plaintiff's right to amend survives the grant of a Rule 12(b)(6) motion to dismiss). In this situation, courts also have the power to conditionally grant the defendant's motion to dismiss while simultaneously granting leave to amend to the plaintiff. *See, e.g.*, Brever v. Rockwell Int'l Corp., 40 F.3d 1119, 1131 (10th Cir. 1994) (district court had "authority to dismiss the case with or without leave to amend the complaint").

89. This concern is repeatedly mentioned in the Advisory Committee Reports and Minutes. *See, e.g., Minutes: Civil Rules Advisory Committee, May 22-23, 2006, supra* note 86, at 24 ("Some judges regularly encounter the frustration of investing time in a motion only to find an amendment of the challenged pleading.").

A second related concern centered on the impact of the plaintiff's Rule 15(a)(1) amendment on the defendant. Like judges, the defendant's bar expressed annoyance with the fact that former Rule 15(a)(1) allowed the plaintiff's attorney to benefit from the defendant's work on a Rule 12 motion.[90] This "free rider" effect[91] was perceived as an unfair shifting of litigation costs from the plaintiff to the defendant.

> Much commercial litigation is driven by cost[s] and the advantage to be gained by shifting costs onto the opposing party. A plaintiff wants to threaten the defendant with litigation costs such as discovery to compel settlement, while incurring as few costs as possible – costs such as researching the law. The plaintiff knows that the defendant will most likely file a motion to dismiss, which will educate the plaintiff about the law, and that – after imposing on the defendant the cost of preparing the motion to dismiss – the plaintiff can take that 'free' legal learning and craft a better complaint, one which may withstand a motion to dismiss and open the gates to discovery. This is obviously a situation that is very frustrating for defendants.[92]

Defendants used this jaundiced view of the plaintiffs' bar to argue that the plaintiff's right to amend as a matter of course should be cut off by the filing of a responsive pleading or motion to dismiss – a position that was ultimately rejected by the Advisory Committee and is not reflected in the amended rule.[93]

Finally, former Rule 15(a)(1) was seen as a source of gratuitous delay and potential prejudice during the pretrial phase of litigation.[94] Judges and defendants' attorneys feared that the plaintiff's right to amend the complaint in response to Rule 12 motions encouraged careless drafting of complaints by the plaintiffs' bar.[95] This, in turn, had the potential to prolong the proceedings by allowing the plaintiff

90. *Report of the Civil Rules Advisory Committee, supra* note 84, at 7 (noting the defendant's "ability to deny the plaintiff the benefit of a free ride on the defendant's legal research, by answering and then filing a motion to dismiss").

91. "A free ride occurs when one party to an arrangement reaps benefits for which another party pays, though that transfer of wealth is not part of the agreement between them." Rothery Storage & Van Co. v. Atlas Van Lines, Inc., 792 F.2d 210, 212 (D.C. Cir. 1986).

92. *Report of the Civil Rules Advisory Committee, supra* note 84, at 7.

93. FED. R. CIV. P. 15(a)(1).

94. This concern is explicitly addressed in the Advisory Committee Note to the 2009 amendment, which notes that new language in the rule terminates the right to amend once as a matter of course 21 days after service of the earlier of the responsive pleading or motion under Rule 12(b), (e), or (f). FED. R. CIV. P. 15 advisory committee's note ("This provision will force the pleader to consider carefully and promptly the wisdom of amending to meet the arguments in the motion."). This is a theme that runs through the Advisory Committee Minutes and Reports leading up to the amendment. *See, e.g., Minutes: Civil Rules Advisory Committee, May 22-23, 2006, supra* note 86, at 24 ("The right [to amend] persists indefinitely. . . . The [rule] amendment will support better judicial management and expedite disposition.").

95. *Report of the Civil Rules Advisory Committee, supra* note 84, at 7 (noting that the "cost and risk" attendant on motions for leave to amend "should lead at least some plaintiffs to pre-

a risk-free trial of the original complaint followed by an unreviewable opportunity to revamp the complaint and raise a new set of issues.[96] Since Rule 15(a)(1) amendments do not require leave, the potential harm was compounded by the fact that the rule did not allow courts to protect defendants from any prejudice that might flow from a late-filed amendment.[97]

The case law relating to Rule 15(a)(1) amendments provides empirical support for the anecdotal discussions found in the Advisory Committee Minutes and Reports. Judicial decisions illustrate the reality of the problem by documenting that as of course amended complaints were frequently filed in response to motions to dismiss,[98] sometimes long after the original complaint,[99] and sometimes after the original complaint had been dismissed.[100] The 2009 amendment to Rule 15(a)(1) was intended to address these concerns and reflects the Advisory Committee's clear intention to shorten the time for amendments as a matter of course to the complaint. And, in fact, the time at which this period *ends* under the amended rule is generally clear. The ambiguity in amended Rule 15(a)(1) becomes apparent only when considering the point at which the window for amendment begins, something that was not the focus of the Advisory Committee's efforts.

about amending the complaint within twenty-one days [illegible] rather than waiting").

BARBARA ANNE ANDERSON, Appellant,

v.

BONDEX INTERNATIONAL, INC. An Ohio Corporation; CBS CORPORATION, A Delaware Corporation (Successor By Merger With CBS Corporation F/K/A Westinghouse Electric Corporation)Formerly Known As Viacom Inc.; GEORGIA-PACIFIC CORPORATION, A Georgia Corporation (Sued Individually And As Successor-In-Interest To Bestwall Gypsum Company); IMO INDUSTRIES, A Delaware Corporation (Sued Individually And As Successor-In-Interest To Delaval Sream Turbine Co.); INGERSOLL-RAND COMPANY, A New Jersey Corporation (Sued Individually And As Successor-In-Interest Terry Steam Turbine Company); OWENS-ILLINOIS INC, A Delaware Corporation (Sued Individually And As Successor-In-Interest To Successor Owens-Illinois Glass Company); PHILIPS ELECTRONICIS NORTH AMERICA CORPORATION, A Delaware Corporation (Sued Individually And As Successor-In-Interest To And As Alter-Ego To Thompson-Hayward Chemical Co.); PRM, INC, A Delaware Corporation (Sued Individually And As Successor-In-Interest To Bondex International, Inc); T H AGRICULTURE & NUTRITION, LLC, A Delaware Corporation (Sued Individually And As Successor-In-Interest To Thompson-Hayward Chemical Co.); TYCO INTERNATIONAL (US), INC., A Massachusetts Corporation (Sued Individually And As Successor-In-Interest To Yarway Corporation); TYCO VALVES & CONTROLS INC., A Texas Corportion (Sued Individually And As Successor-In-Interest To Yarway Corporation); UNION CARBIDE CORPORATION, A New York Corporation; YARWAY CORPORATION, A Delaware Corporation (Sued Individually And As Successor-In-Interest To Yarnall Warning Co.)[*].

No. 10-2306.

United States Court of Appeals, Third Circuit.

Submitted Pursuant to Third Circuit LAR 34.1(a) May 31, 2013.
Filed: January 7, 2014.

Before: JORDAN, VANASKIE, Circuit Judges, and RAKOFF[*], Senior District Judge.

NOT PRECEDENTIAL

OPINION

VANASKIE, Circuit Judge.

Barbara Anderson appeals from an order of the District Court finding that her proposed amended complaint did not relate back to her original pleading. Because we agree with the District Court that the two pleadings did not arise out of the same "conduct, transaction, or occurrence," as required by Fed. R. Civ. P. 15(c)(1)(B), we will affirm.

I.

On August 16, 2006, Barbara Anderson was diagnosed with mesothelioma. She filed a complaint in the Circuit Court for the City of Richmond on October 26, 2006, alleging that her mesothelioma was caused by exposure to "asbestos dust and fibers from [her father's] asbestos-laden workclothes." (Appendix ("A.") 60.) Anderson's father worked as a pipe cover insulator at Portsmouth Naval Shipyard. Anderson argued that she was exposed to asbestos from 1947, when her father began working at the Shipyard, until 1956. Anderson named more than twenty defendants, including Georgia-Pacific Corporation ("Georgia-Pacific"), and Union Carbide Corporation ("Union Carbide") (collectively, "Appellees"), alleging she was entitled to recover under theories of negligence and breach of warranty. Hoping to avoid removal to federal court, Anderson also "disclaim[ed] any cause of action for any injuries caused by any exposure to asbestos dust that occurred in a federal enclave." (A. 65 ¶ 10.)

At the time she filed her original complaint, Anderson believed her only exposure to asbestos occurred from 1947 to 1956, when she lived with her father while he was working at the Naval Shipyard. When Anderson was subsequently deposed in January 2007, however, she testified that she believed she was also exposed to asbestos dust in Federal office buildings where she worked during the 1960s and '70s.

Based on Anderson's deposition testimony, Georgia-Pacific filed a notice of removal, explaining that Anderson alleged asbestos exposure during her employment in buildings located within federal enclaves, and that, as such, the action was removable pursuant to 28 U.S.C. § 1441. The case proceeded in federal court as part of the asbestos Multidistrict Litigation in the Eastern District of Pennsylvania, and Magistrate Judge David Strawbridge oversaw the pretrial proceedings.

On May 21, 2009, several defendants filed motions for summary judgment. On June 10, 2009, Anderson filed a motion to amend her original complaint. In addition to removing the federal enclave disclaimer, her proposed amended complaint alleged that she "was exposed to dust from asbestos-containing joint compound products during ongoing construction and renovation projects taking place in the office buildings where she worked" during the 1960s and '70s. (A. 578 ¶ 1.) Her amended complaint did not include the allegations of household asbestos exposure during her childhood.

The Magistrate Judge denied Anderson's motion for leave to amend, finding that the proposed amended complaint was barred by the applicable statute of limitations and did not relate back to her original complaint because it alleged a subsequent phase of asbestos exposure. Anderson filed objections to the Magistrate Judge's order, which the District Court overruled.

Anderson now appeals the District Court's order overruling her objections, arguing the District Court erred in finding that her amended complaint does not relate back to her original pleading. Specifically, she argues the District Court erroneously applied a standard for relation back that is limited to habeas corpus proceedings, and erred in finding that notice to defendants of an amended claim must come from the original complaint.

II.

The District Court had jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1441. We have appellate jurisdiction pursuant to 28 U.S.C. § 1291. We exercise plenary review over a district court's interpretation and application of the Federal Rules of Civil Procedure. *Glover v. FDIC*, 698 F.3d 139, 144 (3d Cir. 2012). However, we review a district court's factual conclusions as to a motion to amend for clear error, *Singletary v. Pa. Dep't of Corrections*, 266 F.3d 186, 193 (3d Cir. 2001), and its decision to grant or deny a motion to amend for abuse of discretion. *Budget Blinds, Inc. v. White*, 536 F.3d 244, 252 (3d Cir. 2008).

A.

Anderson first argues that the District Court misapplied Federal Rule of Civil Procedure 15, which governs amended pleadings, by employing the Supreme Court's holding in *Mayle v. Felix*, 545 U.S. 644 (2005). She contends that *Mayle* established an exacting test for relation back that should be limited to federal habeas corpus proceedings.[1]

Federal Rule of Civil Procedure 15 provides, in the context relevant here, that "a party may amend its pleading only with the opposing party's written consent or the court's leave." Fed. R. Civ. P. 15(a)(2). Rule 15 counsels courts to "freely give leave [to amend] when justice so requires." *Id.* However, "undue delay, bad faith, and futility" justify a court's denial of leave to amend, *Arthur v. Maersk, Inc.*, 434 F.3d 196, 204 (3d Cir. 2006), and amendment of a complaint is "futile" if "that claim would not be able to overcome the statute of limitations." *Cowell v. Palmer Twp.*, 263 F.3d 286, 296 (3d Cir. 2001). Where a claim is barred by the statute of limitations, amendment is only permitted if the proposed amended complaint "relates back to the date of the original pleading" pursuant to Rule 15(c).

Here, it is undisputed that Anderson's claims are governed by Virginia's two-year statute of limitations. *See* Va. Code Ann. §§ 8.01-243 and 8.01-249(4). It is also undisputed that, unless the amended complaint relates back to her original complaint, Anderson's claims are time-barred.[2]

Rule 15(c) provides, in pertinent part, that "[a]n amendment to a pleading relates back to the date of the original pleading when . . . 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." Fed. R. Civ. P. 15(c)(1)(B).[3] We have interpreted Rule 15(c) as requiring "a common core of operative facts in the two pleadings." *Bensel v. Allied Pilots Ass'n*, 387 F.3d 298, 310 (3d Cir. 2004). Accordingly, proposed amendments relate back if they "restate the original claim with greater particularity or amplify the factual circumstances surrounding the pertinent conduct, transaction or occurrence in the preceding pleading." *Id.*

Interpreting Rule 15(c)'s application to petitions for habeas corpus, the Supreme Court held that "[a]n amended habeas petition . . . does not relate back . . . when it asserts a new ground for relief supported by facts that differ in both time and type from those the original pleading set forth." *Mayle*, 545 U.S. at 650. The Magistrate Judge quoted this language in its Memorandum Opinion, noting that, although the Court decided *Mayle* in the context of habeas corpus, the principle "applies equally here" because *Mayle* was predicated on the relevant subsection of Rule 15(c). (A. 7.) The District Court adopted the reasoning of the Magistrate Judge, but did not reference the "time and type" language from *Mayle*. Instead, the District Court merely cited that case for the general "common core of operative fact" test.

Nevertheless, Anderson argues the District Court erred in applying the standard expounded in *Mayle*, which, she asserts, is more stringent than the standard for ordinary civil cases. She urges that the proper inquiry is set out in *Tiller v. Atlantic Coast Line R. Co.*, 323 U.S. 574 (1945), where the Supreme Court held that an amended complaint related back even though it added a new claim. In *Tiller*, a widow brought suit against a railroad company after her husband was struck and killed by a railroad car. The original complaint in *Tiller* alleged negligence for failure to provide a lookout who could warn of coming trains, and the amended complaint alleged negligence for failure to properly light the railroad car. *Id.* at 580. Asserting that, under *Tiller*, relation back is proper even if the amended pleading alters the "mode in which the defendant breached the legal duty or caused the injury," (Appellant's Br. 27 (citing *Davis v. Yellow Cab Co.*, 35 F.R.D. 159, 161 (E.D. Pa. 1964)), Anderson argues her amended complaint relates back under this standard.

We are not persuaded. First, we note that the District Court did not rely on the *Mayle* "time and type" language, but instead applied the long-standing test for relation back, which analyzes whether the amended complaint shares a "common core of operative fact" with the original pleading. *Bensel*, 387 F.3d at 310.

Second, the Supreme Court's analysis in *Mayle* was consistent with — not more exacting than — its application of Rule 15(c) in other contexts. *Mayle*, 545 U.S. at 664 ("Our reading is consistent with the general application of Rule 15 (c)(2)."). Indeed, rather than holding that Rule 15(c) should be applied more rigorously in the habeas context, the Supreme Court explained that it was reining in what it saw as the lower courts' more liberal construction of Rule 15(c) in habeas cases than in "run-of-the-mine civil proceedings." *Id.* at 657. Thus, we have utilized *Mayle's* "time and type"

language in the non-habeas civil context. *See* Glover, 698 F.3d at 147 ("In other words, [Appellant's] amended FDCPA claims differed in `time and type' from the claims earlier alleged.") (citing Mayle, 545 U.S. at 657-59).

Furthermore, Anderson does not meet the general standards for relation back as set forth in *Tiller* or *Bensel.* Relation back under Rule 15(c) requires an amended complaint to share a "common core of operative facts" with the original pleading. Bensel, 387 F.3d at 310. Although Anderson characterizes her proposed amendment as merely "alter[ing] the mode by which defendants caused the injury," (Appellant's Br. 17), her amended complaint alleges entirely separate exposure years later while she herself was working. We therefore agree with the District Court that "[t]he only thing that the two complaints have in common is [Anderson] herself, and the unfortunate fact that she may have been exposed to asbestos twice in her life, under unrelated circumstances." (A. 22.) Thus, we conclude that the District Court properly interpreted and applied Rule 15(c).

B.

Anderson next argues that she meets the requirements for relation back because the defendants in this case had actual notice of her intent to pursue a claim based on her workplace exposure to asbestos in the 1960s and `70s. Specifically, she asserts that the District Court erred in finding that notice must come from the original pleading, and in finding that her original complaint failed to put defendants on notice of her amended claim.

We have explained that fair notice is "the touchstone for relation back . . . because Rule 15(c) is premised on the theory that `a party who has been notified of litigation concerning a particular occurrence has been given all the notice that statutes of limitations were intended to provide.'" Glover, 698 F.3d at 146 (quoting Baldwin Cty. Welcome Ctr. v. Brown, 466 U.S. 147, 149 n.3 (1984)). Our precedent states unequivocally, however, that an amendment does not relate back "where the *original* pleading does not give a defendant `fair notice of what the plaintiff's [amended] claim is and the grounds up on which it rests.'" Glover, 698 F.3d at 146 (quoting Baldwin, 466 U.S. at 149 n.3) (emphasis added). We therefore reject Anderson's argument that notice need not come from the original pleading.

We likewise reject Anderson's contention that her original complaint put Appellees on notice of her amended claim. The original complaint made no mention of workplace exposure during the 1960s and `70s, and in fact explicitly disclaimed any cause of action related to her employment within federal enclaves.

Accordingly, we agree with the District Court that Anderson was required to provide fair notice in her original pleading of asbestos exposure in the workplace, and that she failed to do so. Thus, we conclude that the District Court did not abuse its discretion in denying Anderson's motion for leave to amend her pleadings.

III.

For the foregoing reasons, we will affirm the judgment of the District Court.

[*] Appellees Specialty Products Holding Corp. f/k/a RPM, Inc. and Bondex International, Inc. filed petitions for relief under Chapter 11 of the Bankruptcy Code. Accordingly, the appeal was stayed by Clerk Order on June 18, 2010 pursuant to 11 U.S.C. § 362. On October 12, 2010, we issued an order severing the case and lifting the stay as to Appellees Georgia-Pacific Corporation and Union Carbide Corporation. The appeal remains stayed as to all other defendants.

[*] The Honorable Jed. S. Rakoff, United States Senior District Judge for the United States District Court for the Southern District of New York, sitting by designation.

[1] Appellees contend Anderson waived this argument because she failed to raise it before the District Court. While they concede that Anderson presented a version of the argument in footnote three of her Brief in Support of Her Objections, *see* (A. 727), Appellees argue this was merely "[a] fleeting reference or vague allusion" that failed to "present[] the argument with sufficient specificity to alert the district court." *In re Ins. Brokerage Antitrust Litigation*, 579 F.3d 241, 262 (3d Cir. 2009). We disagree. Anderson's explicit presentation of the issue was sufficient to preserve it for our review. *See id.* (holding "explicit mention" and "brief discussion" of issues sufficient to preserve for appellate review).

SUPREME COURT OF THE UNITED STATES

No. 09-337

WANDA KRUPSKI, PETITIONER *v.* COSTA CROCIERE S. P. A.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

[June 7, 2010]

JUSTICE SOTOMAYOR delivered the opinion of the Court.

Rule 15(c) of the Federal Rules of Civil Procedure governs when an amended pleading "relates back" to the date of a timely filed original pleading and is thus itself timely even though it was filed outside an applicable statute of limitations. Where an amended pleading changes a party or a party's name, the Rule requires, among other things, that "the party to be brought in by amendment . . . knew or should have known that the action would have been brought against it, but for a mistake concerning the proper party's identity." Rule 15(c)(1)(C). In this case, the Court of Appeals held that Rule 15(c) was not satisfied because the plaintiff knew or should have known of the proper defendant before filing her original complaint. The court also held that relation back was not appropriate because the plaintiff had unduly delayed in seeking to amend. We hold that relation back under Rule 15(c)(1)(C) depends on what the party to be added knew or should have known, not on the amending party's knowledge or its timeliness in seeking to amend the pleading. Accordingly, we reverse the judgment of the Court of Appeals.

I

On February 21, 2007, petitioner, Wanda Krupski, tripped over a cable and fractured her femur while she was on board the cruise ship Costa Magica. Upon her return home, she acquired counsel and began the process of seeking compensation for her injuries. Krupski's passenger ticket—which explained that it was the sole contract between each passenger and the carrier, App. to Pet. for Cert. 37a—included a variety of requirements for obtaining damages for an injury suffered on board one of the carrier's ships. The ticket identified the carrier as

> "Costa Crociere S. p. A., an Italian corporation, and all Vessels and other ships owned, chartered, operated, marketed or provided by Costa Crociere, S. p. A., and all officers, staff members, crew members, independent contractors, medical providers, concessionaires, pilots, suppliers, agents and assigns onboard said Vessels, and the manufacturers of said Vessels and all their component parts." *Id.*, at 27a.

The ticket required an injured party to submit "written notice of the claim with full particulars . . . to the carrier or its duly authorized agent within 185 days after the date of injury." *Id.*, at 28a. The ticket further required any lawsuit to be "filed within one year after the date of injury" and to be "served upon the carrier within 120 days after filing." *Ibid.* For cases arising from voyages departing from or returning to a United States port in which the amount in controversy exceeded $75,000, the ticket designated the United States District Court for the Southern District of Florida in Broward County, Florida, as the exclusive forum for a lawsuit. *Id.*, at 36a. The ticket extended the "defenses, limitations and exceptions . . . that may be invoked by the CARRIER" to "all persons who may act on behalf of the CARRIER or on whose behalf the CARRIER may act," including "the CARRIER's parents,

subsidiaries, affiliates, successors, assigns, representatives, agents, employees, servants, concessionaires and contractors" as well as "Costa Cruise Lines N. V.," identified as the "sales and marketing agent for the CARRIER and the issuer of this Passage Ticket Contract." *Id.*, at 29a. The front of the ticket listed Costa Cruise Lines' address in Florida and stated that an entity called "Costa Cruises" was "the first cruise company in the world" to obtain a certain certification of quality. *Id.*, at 25a.

On July 2, 2007, Krupski's counsel notified Costa Cruise Lines of Krupski's claims. App. 69–70. On July 9, 2007, the claims administrator for Costa Cruise requested additional information from Krupski "[i]n order to facilitate our future attempts to achieve a pre-litigation settlement." App. to Pet. for Cert. 23a–24a. The parties were unable to reach a settlement, however, and on February 1, 2008—three weeks before the 1-year limitations period expired—Krupski filed a negligence action against Costa Cruise, invoking the diversity jurisdiction of the Federal District Court for the Southern District of Florida. The complaint alleged that Costa Cruise "owned, operated, managed, supervised and controlled" the ship on which Krupski had injured herself; that Costa Cruise had extended to its passengers an invitation to enter onto the ship; and that Costa Cruise owed Krupski a duty of care, which it breached by failing to take steps that would have prevented her accident. App. 23–26. The complaint further stated that venue was proper under the passenger ticket's forum selection clause and averred that, by the July 2007 notice of her claims, Krupski had complied with the ticket's presuit requirements. *Id.*, at 23. Krupski served Costa Cruise on February 4, 2008.

Over the next several months—after the limitations period had expired—Costa Cruise brought Costa Crociere's existence to Krupski's attention three times. First, on February 25, 2008, Costa Cruise filed its answer, as-

serting that it was not the proper defendant, as it was merely the North American sales and marketing agent for Costa Crociere, which was the actual carrier and vessel operator. *Id.*, at 31. Second, on March 20, 2008, Costa Cruise listed Costa Crociere as an interested party in its corporate disclosure statement. App. to Pet. for Cert. 20a. Finally, on May 6, 2008, Costa Cruise moved for summary judgment, again stating that Costa Crociere was the proper defendant. App. 5, 33–38.

On June 13, 2008, Krupski responded to Costa Cruise's motion for summary judgment, arguing for limited discovery to determine whether Costa Cruise should be dismissed. According to Krupski, the following sources of information led her to believe Costa Cruise was the responsible party: The travel documents prominently identified Costa Cruise and gave its Florida address; Costa Cruise's Web site listed Costa Cruise in Florida as the United States office for the Italian company Costa Crociere; and the Web site of the Florida Department of State listed Costa Cruise as the only "Costa" company registered to do business in that State. *Id.*, at 43–45, 56–59. Krupski also observed that Costa Cruise's claims administrator had responded to her claims notification without indicating that Costa Cruise was not a responsible party. *Id.*, at 45. With her response, Krupski simultaneously moved to amend her complaint to add Costa Crociere as a defendant. *Id.*, at 41–42, 52–54.

On July 2, 2008, after oral argument, the District Court denied Costa Cruise's motion for summary judgment without prejudice and granted Krupski leave to amend, ordering that Krupski effect proper service on Costa Crociere by September 16, 2008. *Id.*, at 71–72. Complying with the court's deadline, Krupski filed an amended complaint on July 11, 2008, and served Costa Crociere on August 21, 2008. *Id.*, at 73, 88–89. On that same date, the District Court issued an order dismissing Costa Cruise

from the case pursuant to the parties' joint stipulation, Krupski apparently having concluded that Costa Cruise was correct that it bore no responsibility for her injuries. *Id.*, at 85–86.

Shortly thereafter, Costa Crociere—represented by the same counsel who had represented Costa Cruise, compare *id.*, at 31, with *id.*, at 100—moved to dismiss, contending that the amended complaint did not relate back under Rule 15(c) and was therefore untimely. The District Court agreed. App. to Pet. for Cert. 8a–22a. Rule 15(c), the court explained, imposes three requirements before an amended complaint against a newly named defendant can relate back to the original complaint. First, the claim against the newly named defendant must have arisen "out of the conduct, transaction, or occurrence set out—or attempted to be set out—in the original pleading." Fed. Rules Civ. Proc. 15(c)(1)(B), (C). Second, "within the period provided by Rule 4(m) for serving the summons and complaint" (which is ordinarily 120 days from when the complaint is filed, see Rule 4(m)), the newly named defendant must have "received such notice of the action that it will not be prejudiced in defending on the merits." Rule 15(c)(1)(C)(i). Finally, the plaintiff must show that, within the Rule 4(m) period, the newly named defendant "knew or should have known that the action would have been brought against it, but for a mistake concerning the proper party's identity." Rule 15(c)(1)(C)(ii).

The first two conditions posed no problem, the court explained: The claim against Costa Crociere clearly involved the same occurrence as the original claim against Costa Cruise, and Costa Crociere had constructive notice of the action and had not shown that any unfair prejudice would result from relation back. App. to Pet. for Cert. 14a–18a. But the court found the third condition fatal to Krupski's attempt to relate back, concluding that Krupski had not made a mistake concerning the identity of the

proper party. *Id.*, at 18a–21a. Relying on Eleventh Circuit precedent, the court explained that the word "mistake" should not be construed to encompass a deliberate decision not to sue a party whose identity the plaintiff knew before the statute of limitations had run. Because Costa Cruise informed Krupski that Costa Crociere was the proper defendant in its answer, corporate disclosure statement, and motion for summary judgment, and yet Krupski delayed for months in moving to amend and then in filing an amended complaint, the court concluded that Krupski knew of the proper defendant and made no mistake.

The Eleventh Circuit affirmed in an unpublished *per curiam* opinion. *Krupski* v. *Costa Cruise Lines, N. V., LLC*, 330 Fed. Appx. 892 (2009). Rather than relying on the information contained in Costa Cruise's filings, all of which were made after the statute of limitations had expired, as evidence that Krupski did not make a mistake, the Court of Appeals noted that the relevant information was located within Krupski's passenger ticket, which she had furnished to her counsel well before the end of the limitations period. Because the ticket clearly identified Costa Crociere as the carrier, the court stated, Krupski either knew or should have known of Costa Crociere's identity as a potential party.[1] It was therefore appropriate to treat Krupski as having chosen to sue one potential party over another. Alternatively, even assuming that she first learned of Costa Crociere's identity as the correct party from Costa Cruise's answer, the Court of Appeals

[1]The Court of Appeals stated that it was "imput[ing]" knowledge to Krupski. 330 Fed. Appx., at 895. Petitioner uses the terms "imputed knowledge" and "constructive knowledge" interchangeably in her brief, while respondent addresses only actual knowledge. Because we reject the Court of Appeals' focus on the plaintiff's knowledge in the first instance, see *infra*, at 8–13, the distinction among these types of knowledge is not relevant to our resolution of this case.

observed that Krupski waited 133 days from the time she filed her original complaint to seek leave to amend and did not file an amended complaint for another month after that. In light of this delay, the Court of Appeals concluded that the District Court did not abuse its discretion in denying relation back.

We granted certiorari to resolve tension among the Circuits over the breadth of Rule 15(c)(1)(C)(ii),[2] 558 U. S. ___ (2010), and we now reverse.

II

Under the Federal Rules of Civil Procedure, 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 plead-

---

[2] See, *e.g.*, *Krupski* v. *Costa Cruise Lines, N. V., LLC*, 330 Fed. Appx. 892, 895 (CA11 2009) *(per curiam)* (case below); *Rendall-Speranza* v. *Nassim*, 107 F. 3d 913, 918 (CADC 1997) (provision does not authorize relation back where plaintiff "was fully aware of the potential defendant's identity but not of its responsibility for the harm alleged"); *Cornwell* v. *Robinson*, 23 F. 3d 694, 705 (CA2 1994) (no relation back where plaintiff knew the identities of the responsible defendants and failed to name them); *Goodman* v. *Praxair, Inc.*, 494 F. 3d 458, 469–470 (CA4 2007) (en banc) (rejecting argument that plaintiff's knowledge of proper corporate defendant's existence and name meant that no mistake had been made); *Arthur* v. *Maersk, Inc.*, 434 F. 3d 196, 208 (CA3 2006) ("A 'mistake' is no less a 'mistake' when it flows from lack of knowledge as opposed to inaccurate description"); *Leonard* v. *Parry*, 219 F. 3d 25, 28–29 (CA1 2000) (plaintiff's knowledge of proper defendant's identity was not relevant to whether she made a "'mistake concerning the identity of the proper party'"). We express no view on whether these decisions may be reconciled with each other in light of their specific facts and the interpretation of Rule 15(c)(1)(C)(ii) we adopt today.

ing; or

"(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." Rule 15(c)(1).

In our view, neither of the Court of Appeals' reasons for denying relation back under Rule 15(c)(1)(C)(ii) finds support in the text of the Rule. We consider each reason in turn.

A

The Court of Appeals first decided that Krupski either knew or should have known of the proper party's identity and thus determined that she had made a deliberate choice instead of a mistake in not naming Costa Crociere as a party in her original pleading. 330 Fed. Appx., at 895. By focusing on Krupski's knowledge, the Court of Appeals chose the wrong starting point. The question under Rule 15(c)(1)(C)(ii) is not whether Krupski knew or should have known the identity of Costa Crociere as the proper defendant, but whether Costa Crociere knew or should have known that it would have been named as a defendant but for an error. Rule 15(c)(1)(C)(ii) asks what the prospective *defendant* knew or should have known during the Rule 4(m) period, not what the *plaintiff* knew or should have known at the time of filing her original

complaint.[8]

Information in the plaintiff's possession is relevant only if it bears on the defendant's understanding of whether the plaintiff made a mistake regarding the proper party's identity. For purposes of that inquiry, it would be error to conflate knowledge of a party's existence with the absence of mistake. A mistake is "[a]n error, misconception, or misunderstanding; an erroneous belief." Black's Law Dictionary 1092 (9th ed. 2009); see also Webster's Third New International Dictionary 1446 (2002) (defining "mistake" as "a misunderstanding of the meaning or implication of something"; "a wrong action or statement proceeding from faulty judgment, inadequate knowledge, or inattention"; "an erroneous belief"; or "a state of mind not in accordance with the facts"). That a plaintiff knows of a party's existence does not preclude her from making a mistake with respect to that party's identity. A plaintiff may know that a prospective defendant—call him party A—exists, while erroneously believing him to have the status of party B. Similarly, a plaintiff may know generally what party A does while misunderstanding the roles that party A and party B played in the "conduct, transaction, or occurrence" giving rise to her claim. If the plaintiff sues party B instead of party A under these circumstances, she has made a "mistake concerning the proper party's identity" notwithstanding her knowledge of the existence of both parties. The only question under Rule

[8]Rule 15(c)(1)(C) speaks generally of an amendment to a "pleading" that changes "the party against whom a claim is asserted," and it therefore is not limited to the circumstance of a plaintiff filing an amended complaint seeking to bring in a new defendant. Nevertheless, because the latter is the "typical case" of Rule 15(c)(1)(C)'s applicability, see 3 Moore's Federal Practice §15.19[2] (3d ed. 2009), we use this circumstance as a shorthand throughout this opinion. See also *id.*, §15.19[3][a]; Advisory Committee's 1966 Notes on Fed. Rule Civ. Proc. 15, 28 U. S. C. App., pp. 122–123 (hereinafter Advisory Committee's 1966 Notes).

15(c)(1)(C)(ii), then, is whether party A knew or should have known that, absent some mistake, the action would have been brought against him.

Respondent urges that the key issue under Rule 15(c)(1)(C)(ii) is whether the plaintiff made a deliberate choice to sue one party over another. Brief for Respondent 11–16. We agree that making a deliberate choice to sue one party instead of another while fully understanding the factual and legal differences between the two parties is the antithesis of making a mistake concerning the proper party's identity. We disagree, however, with respondent's position that any time a plaintiff is aware of the existence of two parties and chooses to sue the wrong one, the proper defendant could reasonably believe that the plaintiff made no mistake. The reasonableness of the mistake is not itself at issue. As noted, a plaintiff might know that the prospective defendant exists but nonetheless harbor a misunderstanding about his status or role in the events giving rise to the claim at issue, and she may mistakenly choose to sue a different defendant based on that misimpression. That kind of deliberate but mistaken choice does not foreclose a finding that Rule 15(c)(1)(C)(ii) has been satisfied.

This reading is consistent with the purpose of relation back: to balance the interests of the defendant protected by the statute of limitations with the preference expressed in the Federal Rules of Civil Procedure in general, and Rule 15 in particular, for resolving disputes on their merits. See, *e.g.*, Advisory Committee's 1966 Notes 122; 3 Moore's Federal Practice §§15.02[1], 15.19[3][a] (3d ed. 2009). A prospective defendant who legitimately believed that the limitations period had passed without any attempt to sue him has a strong interest in repose. But repose would be a windfall for a prospective defendant who understood, or who should have understood, that he escaped suit during the limitations period only because

the plaintiff misunderstood a crucial fact about his identity. Because a plaintiff's knowledge of the existence of a party does not foreclose the possibility that she has made a mistake of identity about which that party should have been aware, such knowledge does not support that party's interest in repose.

Our reading is also consistent with the history of Rule 15(c)(1)(C). That provision was added in 1966 to respond to a recurring problem in suits against the Federal Government, particularly in the Social Security context. Advisory Committee's 1966 Notes 122. Individuals who had filed timely lawsuits challenging the administrative denial of benefits often failed to name the party identified in the statute as the proper defendant—the current Secretary of what was then the Department of Health, Education, and Welfare—and named instead the United States; the Department of Health, Education, and Welfare itself; the nonexistent "Federal Security Administration"; or a Secretary who had recently retired from office. *Ibid.* By the time the plaintiffs discovered their mistakes, the statute of limitations in many cases had expired, and the district courts denied the plaintiffs leave to amend on the ground that the amended complaints would not relate back. Rule 15(c) was therefore "amplified to provide a general solution" to this problem. *Ibid.* It is conceivable that the Social Security litigants knew or reasonably should have known the identity of the proper defendant either because of documents in their administrative cases or by dint of the statute setting forth the filing requirements. See 42 U. S. C. §405(g) (1958 ed., Supp. III). Nonetheless, the Advisory Committee clearly meant their filings to qualify as mistakes under the Rule.

Respondent suggests that our decision in *Nelson* v. *Adams USA, Inc.*, 529 U. S. 460 (2000), forecloses the reading of Rule 15(c)(1)(C)(ii) we adopt today. We disagree. In that case, Adams USA, Inc. (Adams), had ob-

tained an award of attorney's fees against the corporation of which Donald Nelson was the president and sole shareholder. After Adams became concerned that the corporation did not have sufficient funds to pay the award, Adams sought to amend its pleading to add Nelson as a party and simultaneously moved to amend the judgment to hold Nelson responsible. The District Court granted both motions, and the Court of Appeals affirmed. We reversed, holding that the requirements of due process, as codified in Rules 12 and 15 of the Federal Rules of Civil Procedure, demand that an added party have the opportunity to respond before judgment is entered against him. *Id.*, at 465–467. In a footnote explaining that relation back does not deny the added party an opportunity to respond to the amended pleading, we noted that the case did not arise under the "mistake clause" of Rule 15(c):[4] "Respondent Adams made no such mistake. It knew of Nelson's role and existence and, until it moved to amend its pleading, chose to assert its claim for costs and fees only against [Nelson's company]." *Id.*, at 467, n. 1.

Contrary to respondent's claim, *Nelson* does not suggest that Rule 15(c)(1)(C)(ii) cannot be satisfied if a plaintiff knew of the prospective defendant's existence at the time she filed her original complaint. In that case, there was nothing in the initial pleading suggesting that Nelson was an intended party, while there was evidence in the record (of which Nelson was aware) that Adams sought to add him only after learning that the company would not be able to satisfy the judgment. *Id.*, at 463–464. This evi-

[4]The "mistake clause" at the time we decided *Nelson* was set forth in Rule 15(c)(3). 529 U. S., at 467, n. 1; 528 F. R. D. 525, 529 (1991). Rule 15(c) was renumbered in 2007 without substantive change "as part of the general restyling of the Civil Rules," at which time it received its current placement in Rule 15(c)(1)(C)(ii). Advisory Committee's 2007 Notes on Fed. Rule Civ. Proc. 15, 28 U. S. C. App., p. 37 (2006 ed., Supp. II).

dence countered any implication that Adams had originally failed to name Nelson because of any "mistake concerning the proper party's identity," and instead suggested that Adams decided to name Nelson only after the fact in an attempt to ensure that the fee award would be paid. The footnote merely observes that Adams had originally been under no misimpression about the function Nelson played in the underlying dispute. We said, after all, that Adams knew of Nelson's "role" as well as his existence. *Id.*, at 467, n. 1. Read in context, the footnote in *Nelson* is entirely consistent with our understanding of the Rule: When the original complaint and the plaintiff's conduct compel the conclusion that the failure to name the prospective defendant in the original complaint was the result of a fully informed decision as opposed to a mistake concerning the proper defendant's identity, the requirements of Rule 15(c)(1)(C)(ii) are not met. This conclusion is in keeping with our rejection today of the Court of Appeals' reliance on the plaintiff's knowledge to deny relation back.

B

The Court of Appeals offered a second reason why Krupski's amended complaint did not relate back: Krupski had unduly delayed in seeking to file, and in eventually filing, an amended complaint. 330 Fed. Appx., at 895. The Court of Appeals offered no support for its view that a plaintiff's dilatory conduct can justify the denial of relation back under Rule 15(c)(1)(C), and we find none. The Rule plainly sets forth an exclusive list of requirements for relation back, and the amending party's diligence is not among them. Moreover, the Rule mandates relation back once the Rule's requirements are satisfied; it does not leave the decision whether to grant relation back to the district court's equitable discretion. See Rule 15(c)(1) ("An amendment . . . *relates back* . . . when" the three listed requirements are met (emphasis added)).

The mandatory nature of the inquiry for relation back under Rule 15(c) is particularly striking in contrast to the inquiry under Rule 15(a), which sets forth the circumstances in which a party may amend its pleading before trial. By its terms, Rule 15(a) gives discretion to the district court in deciding whether to grant a motion to amend a pleading to add a party or a claim. Following an initial period after filing a pleading during which a party may amend once "as a matter of course," "a party may amend its pleading only with the opposing party's written consent or the court's leave," which the court "should freely give ... when justice so requires." Rules 15(a)(1)–(2). We have previously explained that a court may consider a movant's "undue delay" or "dilatory motive" in deciding whether to grant leave to amend under Rule 15(a). *Foman* v. *Davis*, 371 U. S. 178, 182 (1962). As the contrast between Rule 15(a) and Rule 15(c) makes clear, however, the speed with which a plaintiff moves to amend her complaint or files an amended complaint after obtaining leave to do so has no bearing on whether the amended complaint relates back. Cf. 6A C. Wright, A. Miller, & M. Kane, Federal Practice and Procedure §1498, pp. 142–143, and nn. 49–50 (2d ed. 1990 and Supp. 2010).

Rule 15(c)(1)(C) does permit a court to examine a plaintiff's conduct during the Rule 4(m) period, but not in the way or for the purpose respondent or the Court of Appeals suggests. As we have explained, the question under Rule 15(c)(1)(C)(ii) is what the prospective defendant reasonably should have understood about the plaintiff's intent in filing the original complaint against the first defendant. To the extent the plaintiff's postfiling conduct informs the prospective defendant's understanding of whether the plaintiff initially made a "mistake concerning the proper party's identity," a court may consider the conduct. Cf. *Leonard* v. *Parry*, 219 F. 3d 25, 29 (CA1 2000) ("[P]ostfiling events occasionally can shed light on the plaintiff's

state of mind at an earlier time" and "can inform *a defendant's* reasonable beliefs concerning whether her omission from the original complaint represented a mistake (as opposed to a conscious choice)"). The plaintiff's postfiling conduct is otherwise immaterial to the question whether an amended complaint relates back.[5]

C

Applying these principles to the facts of this case, we think it clear that the courts below erred in denying relation back under Rule 15(c)(1)(C)(ii). The District Court held that Costa Crociere had "constructive notice" of Krupski's complaint within the Rule 4(m) period. App. to Pet. for Cert. 15a–17a. Costa Crociere has not challenged this finding. Because the complaint made clear that Krupski meant to sue the company that "owned, operated, managed, supervised and controlled" the ship on which she was injured, App. 23, and also indicated (mistakenly) that Costa Cruise performed those roles, *id.*, at 23–27, Costa Crociere should have known, within the Rule 4(m) period, that it was not named as a defendant in that complaint only because of Krupski's misunderstanding about which "Costa" entity was in charge of the ship—clearly a "mistake concerning the proper party's identity."

Respondent contends that because the original complaint referred to the ticket's forum requirement and presuit claims notification procedure, Krupski was clearly aware of the contents of the ticket, and because the ticket identified Costa Crociere as the carrier and proper party

[5] Similarly, we reject respondent's suggestion that Rule 15(c) requires a plaintiff to move to amend her complaint or to file and serve an amended complaint within the Rule 4(m) period. Rule 15(c)(1)(C)(i) simply requires that the prospective defendant has received sufficient "notice of the action" within the Rule 4(m) period that he will not be prejudiced in defending the case on the merits. The Advisory Committee Notes to the 1966 Amendment clarify that "the notice need not be formal." Advisory Committee's 1966 Notes 122.

for a lawsuit, respondent was entitled to think that she made a deliberate choice to sue Costa Cruise instead of Costa Crociere. Brief for Respondent 13. As we have explained, however, that Krupski may have known the contents of the ticket does not foreclose the possibility that she nonetheless misunderstood crucial facts regarding the two companies' identities. Especially because the face of the complaint plainly indicated such a misunderstanding, respondent's contention is not persuasive. Moreover, respondent has articulated no strategy that it could reasonably have thought Krupski was pursuing in suing a defendant that was legally unable to provide relief.

Respondent also argues that Krupski's failure to move to amend her complaint during the Rule 4(m) period shows that she made no mistake in that period. *Id.*, at 13–14. But as discussed, any delay on Krupski's part is relevant only to the extent it may have informed Costa Crociere's understanding during the Rule 4(m) period of whether she made a mistake originally. Krupski's failure to add Costa Crociere during the Rule 4(m) period is not sufficient to make reasonable any belief that she had made a deliberate and informed decision not to sue Costa Crociere in the first instance.[6] Nothing in Krupski's conduct during the Rule 4(m) period suggests that she failed to name Costa Crociere because of anything other than a mistake.

It is also worth noting that Costa Cruise and Costa

[6]The Court of Appeals concluded that Krupski was not diligent merely because she did not seek leave to add Costa Crociere until 133 days after she filed her original complaint and did not actually file an amended complaint for another a month after that. 330 Fed. Appx., at 895. It is not clear why Krupski should have been found dilatory for not accepting at face value the unproven allegations in Costa Cruise's answer and corporate disclosure form. In fact, Krupski moved to amend her complaint to add Costa Crociere within the time period prescribed by the District Court's scheduling order. See App. 3, 6–7; Record, Doc. 23, p. 1.

Crociere are related corporate entities with very similar names; "crociera" even means "cruise" in Italian. Cassell's Italian Dictionary 137, 670 (1967). This interrelationship and similarity heighten the expectation that Costa Crociere should suspect a mistake has been made when Costa Cruise is named in a complaint that actually describes Costa Crociere's activities. Cf. *Morel* v. *DaimlerChrysler AG*, 565 F. 3d 20, 27 (CA1 2009) (where complaint conveyed plaintiffs' attempt to sue automobile manufacturer and erroneously named the manufacturer as Daimler-Chrysler Corporation instead of the actual manufacturer, a legally distinct but related entity named DaimlerChrysler AG, the latter should have realized it had not been named because of plaintiffs' mistake); *Goodman* v. *Praxair, Inc.*, 494 F. 3d 458, 473–475 (CA4 2007) (en banc) (where complaint named parent company Praxair, Inc., but described status of subsidiary company Praxair Services, Inc., subsidiary company knew or should have known it had not been named because of plaintiff's mistake). In addition, Costa Crociere's own actions contributed to passenger confusion over "the proper party" for a lawsuit. The front of the ticket advertises that "Costa Cruises" has achieved a certification of quality, App. to Pet. for Cert. 25a, without clarifying whether "Costa Cruises" is Costa Cruise Lines, Costa Crociere, or some other related "Costa" company. Indeed, Costa Crociere is evidently aware that the difference between Costa Cruise and Costa Crociere can be confusing for cruise ship passengers. See, *e.g.*, *Suppa* v. *Costa Crociere, S. p. A.*, No. 07–60526–CIV, 2007 WL 4287508, *1, (SD Fla., Dec. 4, 2007) (denying Costa Crociere's motion to dismiss the amended complaint where the original complaint had named Costa Cruise as a defendant after "find[ing] it simply inconceivable that Defendant Costa Crociere was not on notice . . . that . . . but for the mistake in the original Complaint, Costa Crociere was the appropriate party

to be named in the action").

In light of these facts, Costa Crociere should have known that Krupski's failure to name it as a defendant in her original complaint was due to a mistake concerning the proper party's identity. We therefore reverse the judgment of the Court of Appeals for the Eleventh Circuit and remand the case for further proceedings consistent with this opinion.

It is so ordered.

RULE 15(c) MISTAKE: THE SUPREME COURT IN *KRUPSKI* SEEKS TO RESOLVE A JUDICIAL THICKET

Robert A. Lusardi[*]

I. INTRODUCTION

The statute of limitations is a device that protects potential defendants from being subjected to suit on stale claims.[1] It is based on the idea that defendants should be free from the risk of litigation after the passage of an arbitrary amount of time, so that they may order their affairs without concern that they will be notified of a suit when information and documents that are needed to defend the matter are no longer available. While recognizing the importance of a statute of limitations, Federal Rule of Civil Procedure 15 acts as a counterbalance to such statutes by allowing a plaintiff to freely amend a complaint to assert additional claims, or to name new or additional parties, and have those amendments relate back to a complaint filed within the statute of limitations even though that statute has run.[2] The intent of the rule is to encourage decisions on the merits by liberally allowing changes to pleadings and having those changes relate back to a timely filed complaint if certain conditions are met.[3]

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[*] Professor of Law, Western New England College School of Law; A.B., Colgate University, 1968; J.D., Boston College, 1971. I would like to thank Michelle L. Himes Wiederschall for her invaluable research assistance with this Article.

[1] Paul D. Carrington, *"Substance" and "Procedure" in the Rules Enabling Act*, 1989 DUKE L.J. 281, 290.

[2] For purposes of this Article, references will be to the current version of the rule, FED. R. CIV. P. 15(c)(1), which reflects the 2007 style amendments but makes no substantive change. It provides:

> (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
>
> (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.

FED. R. CIV. P. 15(c)(1).

[3] *See* Carrington, *supra* note 1, at 310–12.

II. PURPOSE OF THE RULE

In the words of Professor Kaplan, "[a] rule of procedure has a sphere of influence beyond its precise text, but how far it should extend is a matter of taste."[18] To judge the meaning of the "mistake" language of Rule 15 requires an examination of the text of the rule, the Advisory Committee's notes on its adoption, and a review of the judicial interpretations of that seemingly simple term to judge what its application should be.

The provision dealing with changing parties that includes the "mistake" language was added to Rule 15(c) in 1966.[19] The Advisory Committee's purpose was to expand on the original rule, which only provided that an amendment could relate back to the date of the original pleading if it "arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading."[20] While that language clearly addressed questions of relation back for additional claims involving the same parties, it did not make clear whether it would apply to situations where new parties were added or the parties were changed. Some courts had read this language broadly to permit amendments to relate back that changed the party or the name of the party.[21] The Advisory Committee addressed this issue because it was particularly concerned with cases against the federal government in which the wrong defendant was named because the plaintiff used names of parties who did not exist, could not be properly sued, or who had retired.[22] In these cases, some courts had refused to permit relation back of the amendments by parties that were made upon "[d]iscovering their mistakes" on the grounds that these amendments would constitute the "commencement of a new proceeding," and so could not relate back to the original filing.[23]

In criticizing the "new proceeding" approach, the Advisory Committee emphasized that it was not consistent with the intent of the rule and that the revisions to the rule were intended to clarify this.[24] The question was not whether the amendment created a "new proceeding," but whether the policy of the statute of limitations was satisfied.[25] That policy, the Advisory Committee asserted, turned on whether the defendant had received adequate notice of the action.[26]

III. Judicial Interpretations of Mistake

A. Origin

The judicial development of the meaning of the "mistake" component of Rule 15(c) originates in the Seventh Circuit Court of Appeals' decision in *Wood v. Worachek*.[38] While that case is almost always cited as the source for the restrictive reading of "mistake" as not including a lack of knowledge, the decision provides little reasoning or authority for that proposition. The case involved a claim against named and unnamed law enforcement officers who were denominated "John Doe and Richard Roe."[39] When the named defendants were successful on motions for summary judgment, the plaintiff amended the complaint to change the names of John Doe and Richard Roe to specific law enforcement officers.[40] The district court then dismissed the claims against the new defendants since the statute of limitations had expired before they were made parties to the action.[41] In response to the plaintiff's contention on appeal that his amendment should relate back to within the statute of limitations, the court of appeals asserted that the amendment did not meet any of the conditions of the rule, but in particular the court spoke to the "mistake" requirement. It concluded that the requirement was not met "where . . . there is a lack of knowledge of the proper party."[42] The court's basis for this view was that the rule was designed to correct misnomers, and so relation back was only permitted where there was "an error made concerning the identity of the proper party and where that party is chargeable with knowledge of the mistake."[43] Since the plaintiff's use of John Doe and Richard Roe was not a mistake, but simply a lack of knowledge as to the identity of the law enforcement officers, he could not make use of Rule 15(c).[44] The court cited another Seventh Circuit case, *Sassi* v. *Breier*, as authority for its distinction between mistake and lack of knowledge.[45] That case was very similar to *Wood* on its facts, which also involved a civil-rights action in which the plaintiff amended the complaint to substitute the previously unknown police officers for John Doe and Richard Doe. The *Sassi* court accepted the findings of the district court that the new defendants did not have notice of the action, nor knowledge that they would have been original defendants "but for [a] mistake or even lack of knowledge of their identities that the newly named defendants would have been named as original defendants."[46] Having left the question of mistake/lack of knowledge open, the court went on to say that naming a John Doe defendant did not toll the statute of limitations "until such time as a named defendant may be substituted."[47] Thus, the court made the point that a John Doe defendant without more is not enough to permit relation back because "[t]o hold otherwise could have an unwarranted impact upon the salutary purposes of statutes of limitations."[48] So *Wood*'s citation of this case is not supportive of its position because *Sassi* does not address the mistake/lack of knowledge question, but only says that if you have not met the Rule 15(c) requirements of notice and knowledge, you cannot go through the back door by listing a John Doe and have that serve as a substitute.

V. APPLYING THE PROPER APPROACH IN ANALYZING RULE 15(c)(1)(C)(ii)

Early in the *Krupski* opinion, Justice Sotomayor stated that the Court sought to "resolve [the] tension among the Circuits" over the proper interpretation of the relation back rule.[141] Therefore, what remains is to examine whether and how the *Krupski* analysis resolves the conflicting positions of the circuit courts in considering the categories of cases in which relation back most commonly occurs.[142]

As to the first category of misnomers and misidentifications, it has always been agreed that the rule would allow for relation back.[143] However, it is also clear after *Krupski* that relation back is not limited to those terms. The Court makes clear that a mistake includes cases in which the plaintiff lacked knowledge as to the proper party and is not limited to "a mere slip of the pen," as had been asserted by a majority of the courts of appeals.[144] While those courts have argued that this would circumvent the statute of limitations, the Supreme Court has clearly affirmed that a broader view of the rule strikes the proper balance of relation back and the statute of limitations.[145] Such a balance was the very intention of the Advisory Committee in proposing the 1966 amendments to Rule 15.[146]

This is also the case in a situation in which a plaintiff knows of the existence of a person, but does not know that the person is potentially liable in the plaintiff's action. The *Krupski* Court makes clear that these cases meet the mistake requirements for relation back and, in doing so, rejects the view of those courts that have characterized these facts as situations in which there was no mistake of identity—because the plaintiff sued the intended party and made a conscious choice in not suing others[147]—reasoning that the plaintiff "knew who those parties were and made a mistake in who it determined it ought to sue under the circumstances."[148] Here the Court

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[140] *See id.* at 2494 ("[R]epose would be a windfall for a prospective defendant who understood, or who should have understood, that he escaped suit during the limitations period only because the plaintiff misunderstood a crucial fact about his identity.").

[141] *Id.* at 2492.

[142] *See supra* text accompanying notes 8–15.

[143] *See, e.g.*, Roberts v. Michaels, 219 F.3d 775 (8th Cir. 2000).

[144] *See Krupski*, 130 S. Ct. at 2494.

[145] *Id.*

[146] *See* FED. R. CIV. P. 15 advisory committee's note to 1966 amendment.

[147] *See supra* text accompanying notes 82 and 90.

[148] Rendall-Speranza v. Nassim, 107 F.3d 913, 918 (D.C. Cir. 1997) (quoting La.-Pac. Corp. v.

expands the concept of mistake of identity to include those situations in which a plaintiff knows of a prospective defendant, but misperceives his status or role in the events giving rise to the claim,[149] and those in which the plaintiff may not have known of the existence of the prospective party until after the statute had run. In both cases, the key question is whether the plaintiff had a full understanding of the facts and law in making the decision either not to sue a prospective defendant or to sue another defendant. If she did so without that full understanding, she would have made a mistake as to the proper party's identity, warranting relation back if the prospective defendant understood her mistake.[150] At the same time, the Supreme Court makes clear that if the plaintiff had made an affirmative decision not to sue a party, and subsequently changed her mind after the statute of limitations had run, the plaintiff would not have made a mistake of identity;[151] but just as importantly, the new defendant would have a strong argument that failing to sue the known potential defendant would not meet the "knew or should have known" component of the rule.[152]

The final situation to consider is the John Doe placeholder case, which was the factual setting for the original rejection of the "lack of knowledge" analysis in the *Wood* case.[153] While some courts have treated John Does and other changes of parties in the same way,[154] there is a distinct difference with these placeholder cases. In the other situations we have considered, there has clearly been some error caused by some lack of understanding on the part of the plaintiff. In John Doe cases it can be argued that the plaintiff has not made a mistake, but is acknowledging that there is or may be

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ASARCO, Inc., 5 F.3d 431, 434 (9th Cir. 1993)).

[149] *Krupski*, 130 S. Ct. at 2494; *see, e.g.*, *Nassim*, 107 F.3d at 918 (involving claim by plaintiff that she did not originally sue the new defendant because she did not think it was the liable party); *see also* Wilson v. United States Gov't, 23 F.3d 559, 560, 563 (1st Cir. 1994) (involving suit where plaintiff sued his employers, believing they were owners of the boats where he was injured, and later learned that the United States was the owner, resulting in court concluding that the plaintiff "fully intended to sue GEGS, he did so, and GEGS turned out to be the wrong party. We have no doubt that Rule 15(c) is not designed to remedy such mistakes."). In taking this position the courts were viewing the rule as only applying to misnomers and misidentifications. While not being originally sued might be a basis for the new defendant to argue that it did not know it was a proper party to the action, it is not a basis to claim that the plaintiff did not make a mistake under the rule. *Contra* Morel v. DaimlerChrysler AG, 565 F.3d 20, 27 (1st Cir. 2009).

[150] *Krupski*, 130 S. Ct. at 2494. *But see* Burdine v. Kaiser, No. 3:09CV1026, 2010 WL 2606257, at *2 n.2 (N.D. Ohio June 25, 2010) (limiting *Krupski* to its facts, and so not to situations in which the plaintiff did not know the identity of the proper defendant, which under Sixth Circuit precedent is not a mistake).

[151] *Krupski*, 130 S. Ct. at 2494; *see, e.g.*, Arthur v. Maersk, Inc., 434 F.3d 196, 204 n.9 (3d Cir. 2006) (citing Garvin v. City of Philadelphia, 354 F.3d 215, 221–22 (3d Cir. 2003); 3 MOORE ET AL., *supra* note 95, ¶ 15.19[3][d]).

[152] *Cf.* Kilkenny v. Arco Marine Inc., 800 F.2d 853, 857 (9th Cir. 1986) ("[P]laintiff's failure to amend its complaint to add a defendant after being notified of a mistake . . . may cause the unnamed party to conclude that it was not named because of strategic reasons . . . .").

[153] *See* discussion *supra* Part III.A.

[154] *See supra* text accompanying notes 53–58.

another defendant or defendants. However, he does not know that person's identity.[155] As a result, if one reads the rule's mistake language and the Court's analysis in *Krupski* as requiring an error caused by a lack of understanding, it presents a superficially stronger linguistic argument than in the other situations discussed that no mistake is involved. The Court in *Krupski* is careful to use the error/mistake language in applying the rule, which suggests some support for this position. However, the Court also makes clear that the language is designed to protect against only strategic choices, not those that occur as a result of a lack of knowledge concerning the identity of the proper defendant.[156] If that prospective defendant has notice and knowledge that it would be a proper defendant but for a lack of factual understanding as to his identity, the prospective defendant would have the very windfall protection of the statute of limitations that the Court sought to prohibit in *Krupski*.[157] Such a reading is also consistent with the policy of the rule, which is to allow decisions on the merits as long as the policy of the statute of limitations is satisfied.[158] To read this language as a bar to John Doe amendments, while allowing relation back to changes of parties or the addition of parties, would be inconsistent with the text and the purpose of the rule.

The text of the rule sets the parameters that apply to changes to the party or the naming of the party. In the setting of an amendment that replaces a John Doe with the actual party, the amendment "changes the party," and so provides entry to the rule. The plaintiff must then show that the notice and knowledge components are met so that the new party is not prejudiced.[159] Consistent with *Krupski*, the "mistake" language is designed to insure that the rule may only be used when the plaintiff did not have an understanding of the prospective defendant's identity.[160] If the prospective defendant knows this, it should not be given the windfall of the statute of limitations any more than a prospective defendant whose status or role was not fully understood.[161]

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[155] *See* Goodman v. Praxair, Inc., 494 F.3d 458, 470–71 (4th Cir. 2007). This is the very situation in *Wood*, and it allowed courts to apply the rule in other situations. *See* Wood v. Worachek, 618 F.2d 1225, 1230 (7th Cir. 1980).

[156] *See Krupski*, 130 S. Ct. at 2496.

[157] *See id.* at 2494.

[158] *See Goodman*, 494 F.3d at 471; Singletary v. Pa. Dep't of Corr., 266 F.3d 186, 201 n.5 (3d Cir. 2001); *see also supra* text accompanying notes 15–20.

[159] *Goodman*, 494 F.3d at 470 ("The Rule's description of when such an amendment relates back . . . focuses on the *notice to the new party* and *the effect on the new party* that the amendment will have. These core requirements preserve for the new party the protections of a statute of limitations." (citation omitted)).

[160] *See id.* at 471.

[161] *Id.* ("The 'mistake' language is textually limited in describing the notice that the new party had, requiring

The important point is that the plaintiff has an opportunity to have his amended claim heard against the newly named party who has replaced the John Doe, but only if the plaintiff can show that the new defendant had the proper notice and knowledge that the rule requires. In this way, a proper balance is struck between the defendant's right to repose and the plaintiff's right to proceed with his claim.

VI. CONCLUSION

In adopting amendments to the relation back provisions of Rule 15(c) in 1966, the Advisory Committee sought to clarify and liberalize the relation back of amendments, changing the party or the naming of the party, in light of the policy of encouraging decisions on the merits. However, the courts have often applied the rule in a narrow fashion that limits its utility as a tool to encourage decisions on the merits. Those courts focused on the mistake language in the rule and applied it only in cases of misnomers and misidentifications. In doing so, these courts seek to protect defendants' rights to repose without acknowledging the fact that those rights have to be balanced against plaintiffs' rights to have a case heard on the merits. In recent years, some courts have begun to expand the application of the rule to a far wider range of cases, which allows the rule to be used in a way that is consistent with the Advisory Committee's intent to encourage decisions on the merits. The tension created by these conflicting cases has been resolved by the Supreme Court's opinion in *Krupski v. Costa Crociere S.p.A.*, which makes clear that courts should read the rule in a way that strikes a proper balance between the interests of the parties and thus avoid a crabbed reading of the rule that would limit its use to "a slip of the pen."

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that the new party have expected or should have expected, within the limitations period, that it would be named in the first place . . . .").

Practice Problem For Amendments

Exam Number _____

FINAL EXAMINATION IN
CIVIL PROCEDURE §3
PROFESSOR LONNY HOFFMAN

SPRING 2006
MAY 3, 2006

Question No. 2 (for typists: limit 500 words)

Creighton Miller is the administrator of the estate of Booker T. Pompey. Pompey worked for many years on various ships owned by American Heavy Lift Shipping, Inc. He was diagnosed with colon cancer and leukemia prior to his death in November 2001. In January 2004, Miller brought suit against American Heavy Lift Shipping, Inc. under state law for common law negligence.

The elements for establishing negligence in this jurisdiction are: (1) a duty owed to the plaintiff; (2) breach of that duty by the defendant; (3) the defendant's breach was a proximate cause of injuries sustained by the plaintiff; and (4) the plaintiff suffered injuries as a result. The statute of limitations on this cause of action is three years, thus Miller's January 2004 filing was within the limitations period.

In particular, relevant language in the complaint read as follows:

> 10. While serving as a mariner on said vessels, Pompey was exposed to asbestos and hazardous substances other than asbestos.
>
> 11. As a direct and proximate consequence of his exposure to asbestos and hazardous substances other than asbestos, Pompey has sustained injuries for which he seeks damages.

more, next page

Exam Number _____

FINAL EXAMINATION IN
CIVIL PROCEDURE §3
PROFESSOR LONNY HOFFMAN

SPRING 2006
MAY 3, 2006

In July 2005, Miller asked the court to grant him leave to amend to add a claim related to benzene exposure which ultimately was a causal factor in Pompey contracting leukemia, as Miller described it in his motion. In the amended complaint (attached to the motion), Miller again alleged a theory of liability under state negligence law. Miller claimed that Pompey had suffered from leukemia as a result of his exposure to benzene and benzene-containing products, and listed specific instances and methods of exposure on particular ships. Defendant did not oppose the motion to amend and the district judge granted leave to amend in August 2005. Plaintiff then promptly filed the amended complaint.

In September 2005 defendant asked the court to dismiss the suit on the ground that Miller's amended complaint did not relate back to his original complaint and that Pompey's negligence claim based on his new allegations of exposure to Benzene was barred by the three-year statute of limitations because it had accrued at least by the date of his death.

The district court granted summary judgment to defendant. The court relied on defendant's uncontested argument that different toxins and different methods of exposure cause different diseases, and found, specifically, that "exposure to benzene does not occur or act in the same manner as exposure to asbestos." Miller filed a timely notice of appeal.

If you were sitting on the appellate court, how would you rule and why?

more, next page

60 S.W.3d 273 (2001)

COMPASS EXPLORATION, INC., Appellant,

v.

B-E DRILLING COMPANY and Ray E. Eubank, Appellees.

No. 10-00-301-CV.

Court of Appeals of Texas, Waco.

October 10, 2001.

275 *275 Jerry C. Hanson, Palestine, for appellant.

276 *276 J. Clinton Schumacher, Locke, Liddell & Sapp, L.L.P., Dallas, for appellee.

Before Chief Justice DAVIS, Justice VANCE, and Justice GRAY.

OPINION

BILL VANCE, Justice.

Compass Exploration, Inc. ("Compass") hired B-E Drilling Company ("B-E") to drill a well on property in Leon County leased by Compass. Ray H. Eubank signed the contract for B-E. There were provisions in the contract about when B-E would be held responsible if the drilling went amiss and the hole was lost. According to the provisions, if the hole deviated from true vertical by more than two degrees between any two periodic tests for vertical, and an event happened during drilling which caused the hole to be abandoned, B-E would be responsible.

The hole was drilled to approximately 12,000 feet. However, when the drill pipe was being extracted, it became stuck and eventually broke off in the hole. Consequently, the well was abandoned. Tests for true vertical had been conducted which indicated the hole may have been more than two degrees off. Compass refused to make full payment under the contract. Accordingly, B-E sued Compass in Dallas County for breach of contract and suit on a sworn account. Compass did not countersue or challenge venue. The suit in Dallas County was tried to the court which ruled in Compass's favor, finding that B-E failed to prove it met the drilling specifications in the contract. A take-nothing judgment was issued against B-E. No appeals were taken.

While the suit in Dallas County was pending, and before trial, Compass filed the present suit in Leon County, claiming breach of contract and negligence. After the judgment in the Dallas County suit, B-E filed a motion for summary judgment in the Leon County suit, asserting that Compass's claims (1) should have been brought as **compulsory** counterclaims in the Dallas County suit, and (2) were barred by res judicata. Compass responded that a mandatory venue statute required its claims to be brought in Leon County. The trial court granted the motion, and Compass appeals.

Compass's response to the motion for summary judgment, and its complaint on appeal, are that the mandatory venue **rule** in section 15.011 of the Civil Practices and Remedies Code (1) requires that its claims be brought in Leon County, and (2) trumps the **compulsory counterclaim rule** in **Rule 97**(a) of the rules of procedure. Tex. Civ. Prac. & REM.CODE ANN. § 15.011 (Vernon Supp.2001); Tex.R. Civ. P. **97(a)**. These provisions read:

§ 15.011. Land

> Actions for recovery of real property or an estate or interest in real property, for partition of real property, to remove encumbrances from the title to real property, for recovery of damages to real property, or to

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quiet title to real property shall be brought in the county in which all or a part of the property is located.

Rule 97. Counterclaim and Cross-Claim

(a) Compulsory Counterclaims. A pleading shall state as a counterclaim any claim within the jurisdiction of the court, not the subject of a pending action, which at the time of filing the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of
277 third parties of whom the court cannot acquire jurisdiction; *277 provided, however, that a judgment based upon a settlement or compromise of a claim of one party to the transaction or occurrence prior to a disposition on the merits shall not operate as a bar to the continuation or assertion of the claims of any other party to the transaction or occurrence unless the latter has consented in writing that said judgment shall operate as a bar.

Standard of Review

A party filing a motion for summary judgment must prove by summary-judgment evidence that "there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law on the issues expressly set out in the motion." Tex.R. Civ. P. 166a(c); *e.g.*, Nixon v. Mr. Property Management Co., 690 S.W.2d 546, 548 (Tex.1985); Delta Air Lines, Inc. v. Norris, 949 S.W.2d 422, 425 (Tex.App.-Waco 1997, writ denied). We must resolve all doubts and indulge every reasonable inference in favor of the non-movant. Nixon, 690 S.W.2d at 549; Delta Air Lines, 949 S.W.2d at 425. A summary judgment is reviewed *de novo*. *E.g.*, Rucker v. Bank One Texas, N.A., 36 S.W.3d 649, 653 (Tex.App.-Waco 2000, pet. filed).

Section 15.011

Compass argues that section 15.011 requires the suit to be brought in Leon County, and therefore the Dallas court was without jurisdiction and its judgment is void. Compass says section 15.011 is a jurisdictional statute. However, it presents no authority for this argument. It is axiomatic that "venue" provisions do not confer "jurisdiction." Furthermore, the district court in Dallas County had jurisdiction to hear Compass's claims, just as the district court in Leon County did. Tex. Const. art. V, § 8 (District courts have "original jurisdiction ... of all suits, complaints or pleas whatever, without regard to any distinction between law and equity, when the matter in controversy shall be valued at or amount to five hundred dollars exclusive of interest ...."); *see also* Tex. Gov't Code Ann. § 24.007 (Vernon 1988). As for venue, if Compass wanted to object to venue in Dallas County, it should have raised the issue in the Dallas County suit by a motion to transfer venue. There is no indication in the record that it did, and therefore it waived this complaint. Tex.R. Civ. P. 86(1).

In addition, B-E's claims do not fall under section 15.011, which by its express wording does not pertain to B-E's breach-of-contract action for damages from non-payment for services performed under the contract. Therefore, absent a venue challenge by Compass, B-E could prosecute its suit in Dallas County. And "[v]enue of the main action shall establish venue of a counterclaim, cross claim, or third-party claim properly joined under the Texas Rules of Civil Procedure or any applicable statute." Tex. Civ. Prac. & Rem.Code Ann. § 15.062 (Vernon Supp.2001).

Section 15.011 possibly could have controlled venue, but only if Compass had filed its Leon County suit first. Because it did not, and for the reasons just stated, section 15.011 does not defeat the summary judgment.

Rule 97(a)

Rule 97(a) by its express wording requires all claims "aris[ing] out of the transaction or occurrence that is the subject matter of the opposing party's claim" to be brought as counterclaims to the pending suit. A counterclaim is compulsory if: (1) it is within the jurisdiction of the court; (2) it is not at the time of filing the answer the subject of a
278 pending action; (3) the action is mature and owned by the pleader at the time of filing the answer; *278 (4) it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim; (5) it is against an opposing party in the same capacity; and (6) it does not require for its adjudication the presence of third parties over whom the

court cannot acquire jurisdiction. *Wyatt v. Shaw Plumbing Co.*, 760 S.W.2d 245, 247 (Tex.1988). "A defendant's failure to assert a **compulsory counterclaim** precludes its assertion in later actions." *Id.*

None of *Wyatt* elements 1, 2, 3, 5, and 6 are in dispute. As for element 4, to determine whether or not a defendant's claim "arises out of the transaction or occurrence that is the subject matter of the [plaintiff's] claim," some courts have used a "logical relationship" test. *E.g.*, *Williams v. National Mortg. Co.*, 903 S.W.2d 398, 404 (Tex.App.-Dallas 1995, writ denied); *Klein v. Dooley*, 933 S.W.2d 255, 259 (Tex.App.-Houston [14th Dist.] 1996), *rev'd on other grounds*, 949 S.W.2d 307 (1997). "When the same facts ... are significant and logically relevant to the various causes of action, the `logical relationship' test is satisfied." *Williams*, 903 S.W.2d at 404 (citing *Jack H. Brown & Co. v. Northwest Sign Co.*, 718 S.W.2d 397, 400 (Tex.App.-Dallas 1986, writ ref'd n.r.e.)).

It is undisputed that both suits pertained to B-E's drilling the well and the loss of the hole, and that performance under the contract was at issue in both suits. We conclude that Compass's claims in the Leon County suit were **compulsory counterclaims** in the Dallas County suit which were forfeited when Compass did not file them as such.

Original Sin and the Transaction in Federal Civil Procedure

Mary Kay Kane*

Much of modern federal procedural developments liberalizing pleading, expanding jurisdiction, enlarging the scope of claims and parties allowed to be joined in a single lawsuit, and ultimately expanding the binding effect given to judgments has been accomplished through the substitution of a transaction standard for various common law or code formulations concerning these issues. Superficially, this might seem to suggest that a unified concept now underlies all of modern procedure. But, as was so eloquently stated by Professor Walter Wheeler Cook, even before the adoption of the Federal Rules of Civil Procedure:

> The tendency to assume that a word which appears in two or more legal rules, and so in connection with more than one purpose, has and should have precisely the same scope in all of them, runs all through legal discussions. It has all the tenacity of original sin and must constantly be guarded against.[1]

It is true that courts do not appear to have been misled by the use of the term "transaction" in these different contexts.[2] Indeed, seldom does one find courts borrowing from one context to support the definition of a transaction in another setting.[3] Rather, the transaction standard has been

applied, for the most part, consistent with the purpose of the procedure or rule for which it is the foundation.[4] Further, it is certain that Professor Charles Alan Wright, to whom this Symposium is dedicated, never would have fallen into the trap of treating the transaction standard as anything but a nuanced term designed to provide courts flexibility and some discretion in developing the policies underlying each of the areas in which it is utilized.[5] Thus, one might ask how an article exploring the development of the transaction standard contributes to the field of federal civil procedure and therefore belongs in an issue of the *Texas Law Review* celebrating the enormous contributions to the field by my esteemed colleague and friend, Professor Wright.

The difficulty is that courts most often do not articulate how the policies underlying a particular procedure or rule influence or shape their definitions of what constitutes a transaction. Explicit judicial reasoning that would ground particular applications of the transaction standard in the policies that underlie the specific issues involved would allow for better scrutiny of the propriety of the results reached. This, in turn, would help to avoid possible misinterpretations and provide better guidance to the bar about how to predict and understand whether the facts and circumstances involved in particular cases do or do not meet the requirements at issue. Failing to provide such an analysis leaves open the door for some confusion in the bar, and even more commonly, among law students who are struggling to find certainty in learning the language of the law and often are prone to Professor Cook's original sin.

I. The Meaning of Transaction as Interpreted Through Policy

In order to engage in a comparison of the proper treatment of what constitutes a transaction in the four areas I have identified, we must first briefly examine the underlying policies that inform the term's interpretation in each area.

A. Rule 15(c), Relation Back of Pleading Amendments

Two general principles that underlie Federal Rule 15, the general federal amendment rule, are particularly applicable to subdivision (c), which governs the relation-back of amendments.[16] First, the rule encourages a liberal amendment practice in order to promote the opportunity to decide claims on the merits rather than on procedural technicalities.[17] Second, amendments are to be allowed consistent with the recognition that the pleadings in federal practice have the limited role of providing parties notice of what the action entails, rather than being relied upon for fact revelation or issue formulation.[18] These two principles support a very broad and liberal approach to amendments. When determining whether to allow a proposed amendment adding a new claim or a new party after the statute of limitations has run, however, notice becomes an important countervailing concern.[19] If the pleadings provided adequate notice that a particular transaction is involved, then the defendant is not entitled to the protection of the statute of limitations.[20] On the other hand, if the court cannot find that the transaction as stated in the original pleadings gave the defendant adequate notice that the proposed new matter might be involved in the lawsuit, then the defendant should be able to rely on the expiration of the limitations period and the amendment will be deemed time barred.[21] Fairness to the defending party demands that result. Consequently, the requirement that the proposed amendment arise out of the same transaction as elaborated in the original pleadings must be interpreted in light of that fairness concern and with an eye toward what legitimately should have been known or recognized as within the scope of the litigation as a result of the initial pleadings.[22]

B. Rules 13 and 20, Claim and Party Joinder

The role of the transaction requirement in the joinder context is quite different from that in the amendment arena. The use of the concept of a transaction as a basis for deciding which claims and parties are properly joined in a lawsuit (and in some instances required to be joined) has been part of the Federal Rules of Civil Procedure since their adoption in 1938. The standard is one derived from equity.[23] It permits joinder premised on notions of trial convenience, rather than resolving those questions based on inquiries into what substantive rights are involved, as was done at common law. This change, from reliance on more restrictive code formulas of what constituted a cause of action to a transaction standard, generally was lauded as one permitting the courts discretion to determine the proper scope of a lawsuit in light of convenience to the courts and to the litigants, thereby avoiding the necessity to relitigate the same issues in different lawsuits. As noted by Professor Wright in an article commenting on similar developments in state procedure: "[C]ourts do not exist to formulate concepts; they exist, rather, to adjudicate controversies . . . . Any device which will reduce the volume of litigation and end the necessity for litigating the same issues over and over in different lawsuits is highly desirable."[24]

Thus, modern joinder policy is to encourage resolving controversies in one lawsuit rather than many, and that policy underlies the determination

of what may constitute a transaction for purposes of Federal Rules 13 and 20.[25] Weighed against that objective is the consideration whether the claims or parties are sufficiently related so that determining them in a single trial will be convenient.

To effectuate those policies when interpreting the joinder rules, courts most frequently have invoked the flexible test of whether the proposed claims are "logically related" and thus should be tried together.[26] Indeed, this test was suggested in a pre-rule case decided by the Supreme Court involving compulsory counterclaims, *Moore v. New York Cotton Exchange*,[27] when the Court commented: "'Transaction' is a word of flexible meaning. It may comprehend a series of many occurrences, depending not so much upon the immediateness of their connection as upon their logical relationship."[28] The logical relationship test has been utilized by the courts to determine the propriety of joinder when the question posed is whether the defendant is allowed to assert a cross-claim against a co-defendant under Federal Rule 13(g)[29] or whether plaintiffs may join together in asserting claims against a defendant or a plaintiff may join several defendants in a single action under Federal Rule 20,[30] as well as when the issue is whether the defendant is required to assert a counterclaim because it is compulsory under Federal Rule 13(a).[31] In all of these instances, when the courts consider whether the claims presented are logically related and thus meet the transaction requirement, the underlying philosophy guiding their decisions is to allow or require joinder if doing so will expedite the resolution of the entire controversy between the parties.[32] As will be explored later,[33] however, in the case of compulsory counterclaims, that inquiry also may involve additional concerns such as when the question is raised not at the outset of the litigation but after it has concluded, so that Rule 13(a) is being invoked for purposes of preventing a party from introducing a claim on the ground that it was improperly omitted from an earlier action.

III. Conclusion

As underscored by the illustrations in the preceding section, care must be taken when applying the transaction standard to the varying doctrines and rules for which it serves as a gatekeeper. The standard's inherent flexibility provides the courts discretion to develop the law in light of the circumstances of each case, while fostering judicial efficiency and economy and promoting decisions on the merits, rather than relying on rigid rules or technicalities. That very flexibility, however, also offers a trap for the unwary lawyer who does not understand how varying policies may influence its interpretation in separate contexts.

It is possible to arrive at an appropriate definition in a given case only by considering whether the proposed scope of a transaction will meet the objectives and policies underlying the standard that is involved. Further, arguments as to what should be included within a particular transaction are best made by referring to those related policies as they provide the basis for a broad or narrow interpretation of the standard as applied to the factual circumstances involved. Consequently, although this piece does not (indeed cannot) provide an answer to the question of what constitutes a transaction, it is hoped that it points the way for others as to how to approach that inquiry with greater understanding of what should be entailed.

Kedra v. City of Philadelphia, 454 F. Supp. 652

United States District Court, E. D. Pennsylvania.

June 29, 1978.

OPINION

LUONGO, District Judge.

This civil rights action arises out of an alleged series of brutal acts committed by Philadelphia policemen against the plaintiffs. The events set forth in the complaint span one and one-half years, from December 1975 to February or March 1977. The defendants have moved to dismiss. *See* Fed.R.Civ.P. 12(b).

I. *The Factual Allegations*

Plaintiffs are Dolores M. Kedra; her children, Elizabeth, Patricia, Teresa, Kenneth, Joseph,[1] Michael, Robert, and James; and Elizabeth's husband, Richard J. Rozanski. Michael, Robert, and James Kedra are minors, and their mother sues on their behalf as parent and natural guardian.

Defendants are the City of Philadelphia; Police Commissioner Joseph J. O'Neill; officials of the Police Department's Homicide Division — Division Chief Donald Patterson, Chief Inspector Joseph Golden, Lieutenant Leslie Simmins, and Sergeant John Tiers; Homicide Detectives Richard Strohm, James Richardson, George Cassidy, and Michael Gannon; Police Lieutenant Augustus C. Miller; Police Officers James Brady, Robert Pitney, Jessie Vassor, and John J. D'Amico; an officer surnamed Tuffo; and other unidentified members of the Police Department. It is alleged that "at all times material to plaintiffs' cause of action [the City of Philadelphia] employed all of the 658*658 individual defendants." It is further alleged that each of the individual defendants, "separately and in concert," acted under color of Pennsylvania law and, "pursuant to their authority as agents, servants, and employees of defendant City of Philadelphia, intentionally and deliberately engaged in the unlawful conduct described . . .." They are sued "individually and in their official capacity" and "jointly and severally."

The series of events set forth in the complaint[2] dates from December 22, 1975. On that evening, Richard Rozanski and Joseph and Michael Kedra were arrested at gun point without probable cause by defendants Vassor and D'Amico and taken to Philadelphia Police Headquarters (the Roundhouse). At the Roundhouse, they were separated and questioned for seventeen hours by defendants Strohm, Richardson, Cassidy, and Gannon. They were not informed of their constitutional rights and were refused requests for counsel. The complaint states —

"During the course of the interrogation, plaintiffs Richard Rozanski, Michael Kedra and Joseph Kedra were handcuffed, struck about the head, face, stomach, abdomen, arms and legs with fists and physical objects, were harassed and threatened with further physical violence by defendants Strohm, Richardson, Cassidy and Gannon; during the course of this interrogation, plaintiff Richard Rozanski's legs

were held apart by two of the defendant detectives while he was kicked in the testicles, groin, buttocks and legs by defendant Strohm."

Rozanski, and Michael and Joseph Kedra each sustained serious injuries as a result of the beatings.

Meanwhile, defendant Richardson forcibly took Elizabeth Rozanski from her mother's house to the Roundhouse, where she was detained and questioned for seventeen hours by defendants Strohm, Gannon, Richardson, and Simmins. She was not advised of her rights. She was shown her husband, who had been beaten badly, and "was threatened with arrest in an attempt to coerce a false statement from her." A warrantless search of her bedroom was conducted by defendant Strohm "and others" without her consent and without probable cause.

On that same evening, Dolores Kedra voluntarily went to the Roundhouse "where she was illegally interrogated, coerced into signing a release authorizing the search of her house and forcibly detained" for nine hours by Strohm, Richardson, Cassidy, Gannon, "and other unidentified defendants."

Seven days later, on the morning of December 29, 1975, defendants Brady and Pitney went to the Kedra home, demanding to see Richard Rozanski and "falsely stating that they had papers for his appearance in Court on the following day." All of the plaintiffs except Dolores Kedra, the mother, were at home at the time. The policemen "attempted to drag [Rozanski] out of the house," but Rozanski and Kenneth Kedra shut and locked the door. Rozanski asked to see a warrant, but Brady and Pitney did not have one. Brady and Pitney then secured the aid of other policemen who, without a warrant or probable cause and "through the use of excessive force," "broke open the door with the butt end of a shotgun and forced their way into the house with shotguns, handguns, blackjacks, and nightsticks in hand." Defendants Brady, Pitney, Miller, Tiers, "and ten to fifteen other defendant members of the Philadelphia Police Department" conducted a thorough search of the house and, while doing so, physically assaulted Patricia, Joseph, Michael, and Kenneth Kedra, inflicting serious injuries. They also attempted to confiscate a camera and note pad being used by Joseph Kedra. It is alleged further that—

"[T]he defendants unlawfully detained plaintiffs within the house by blocking off both the front and rear doors, holding plaintiffs in fear of life and limb by visibly displaying shotguns, handguns and 659*659 nightsticks, and through threats of violence, coercion and abusive language."

Rozanski and Joseph, Michael, and Kenneth Kedra were taken to the Roundhouse in a police van, and Kenneth was beaten while being led to the van. At the Roundhouse, Michael and Kenneth were "unlawfully detained" for twenty-four hours, and Rozanski "was struck in the face by defendant Strohm" and was denied repeated requests for counsel. "[W]ithout just or probable cause," Rozanski was charged with murder, burglary, and receiving stolen goods, and Kenneth and Joseph were charged with assault and battery, harboring a fugitive, and resisting arrest. In defending these charges, they incurred attorney's fees. All three later were acquitted on all counts.

With respect to the December 1975 events, the complaint sets forth the following general allegations:

"17. At all times material to plaintiffs' cause of action, plaintiff Richard Rozanski, through his attorney, offered to voluntarily surrender to the Philadelphia Police; the defendants chose, however, to engage in the course of conduct described in detail above, the purpose and effect of which was to knowingly, intentionally and deliberately deprive plaintiffs of rights secured by the Constitution of the United States.

18. All of the aforementioned acts were committed by defendants intentionally, deliberately and maliciously, pursuant to their authority as agents, servants and employees of the Police Department of the City of Philadelphia.

19. The aforementioned acts were committed with the consent and knowledge and at the direction of defendants Joseph F. O'Neill in his capacity as Police Commissioner of the City of Philadelphia.

20. The aforementioned acts were committed with the knowledge and consent and at the direction of defendant Joseph Golden in his official capacity as Chief Inspector of the Homicide Division of the Police Department of the City of Philadelphia.

21. The aforementioned acts were committed with the knowledge and consent and at the direction of Captain Donald Patterson, Chief of the Homicide Division of the Philadelphia Police Department, Lieutenant Lesley Simmins and Sergeant John Tiers, in their official capacities as supervisory officials of the Philadelphia Police Department.

22. The defendants named in Paragraphs 18, 19, 20 and 21 are and were at all times material to plaintiffs' cause of action in a position to exercise direct supervision of the defendant officers and detectives and did in fact exercise such control and supervision at all times material to plaintiffs' cause of action.

23. All of the aforementioned acts were committed without just or probable cause with regard to each of the plaintiffs."

The complaint alleges further that "defendants have engaged and continue to engage in a systematic pattern of harassment, threats and coercion with the intention of, and having the effect of depriving plaintiffs of . . . rights and privileges . . .." As part of this "pattern," Michael Kedra was arrested in June 1976 and was beaten by defendant Strohm, "who handcuffed plaintiff's hands behind his back, and struck him in the chest and stomach with a nightstick and fist." James Kedra has been "harassed and threatened without cause" by defendants D'Amico, Brady and Pitney, and in February or March 1977 "was grabbed by the shirt" by Tuffo and Pitney "and threatened with physical violence."

The complaint asserts that "as a result of the aforementioned actions, plaintiffs have suffered and continue to suffer severe emotional distress."

II. *The Suit and the Motion*

Plaintiffs' complaint was filed on November 23, 1977. The action is brought under the Constitution and the Civil Rights Act of 1871, 42 U.S.C. §§ 1983, 1985, 1986. Jurisdiction is based on 28 U.S.C. §§ 1331 and 1343. As a basis for their civil rights 660*660 claims, the plaintiffs assert that defendants' actions deprived them of the following federal "rights, privileges and immunities":

"(a) The right of free speech and the right to peacably [*sic*] assemble under the First and Fourteenth Amendments.

(b) The right to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures under the Fourth and Fourteenth Amendments.

(c) The prohibition against compulsory self-incrimination under the Fifth and Fourteenth Amendments.

(d) The right to be free from deprivation of life, liberty or property without due process of law under the Fifth and Fourteenth Amendments.

(e) The prohibition against cruel and unusual punishment under the Eighth and Fourteenth Amendments."

Without explanation, the complaint also cites the Equal Protection Clause of the Fourteenth Amendment and Article 1, §§ 1, 8, and 9 of the Pennsylvania Constitution. Plaintiffs also invoke the pendent jurisdiction doctrine to assert additional claims under Pennsylvania law "for false arrest, false imprisonment, malicious prosecution, assault and battery, trespass to real and personal property and negligent and intentional infliction of emotional distress." Plaintiffs seek compensatory and punitive damages in excess of $10,000 and attorneys' fees and costs.

All of the named defendants have filed the motion to dismiss. It is based on several grounds[3] and raises questions of procedure as well as jurisdictional and substantive issues under the civil rights laws. In addition, the pendent state claims raise jurisdictional issues not discussed in the motion which should be examined in this opinion.

III. *Procedural Questions*

Defendants' motion raises two matters that essentially are procedural. First, they contest Dolores Kedra's prosecution of the case on behalf of her minor sons, Michael, Robert, and James. Second, they contend that there has been an improper joinder of parties.

B. *Joinder*

Defendants contend that there has been an improper joinder of parties under Federal Rule of Civil Procedure 20(a), which provides:

"All persons may join in one action as plaintiffs if they assert any right to relief jointly, severally, or in the alternative in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all these persons will arise in the action. All

persons . . . may be joined in one action as defendants if there is asserted against them jointly, severally, or in the alternative, any right to relief in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all defendants will arise in the action. A plaintiff or defendant need not be interested in obtaining or defending against all the relief demanded. Judgment may be given for one or more of the plaintiffs according to their respective rights to relief, and against one or more defendants according to their respective liabilities."

Defendants argue that plaintiffs' claims against them do not "aris[e] out of the same transaction, occurrence, or series of transactions or occurrences" because they stem from events spanning a fourteen or fifteen month period.[6]

The joinder provisions of the Federal Rules are very liberal. As the Supreme Court noted in *United Mine Workers v. Gibbs*, 383 U.S. 715, 86 S.Ct. 1130, 16 L.Ed.2d 218 (1966),

"Under the Rules, the impulse is toward entertaining the broadest possible scope of action consistent with fairness to the parties; joinder of claims, parties and remedies is strongly encouraged."

383 U.S. at 724, 86 S.Ct. at 1138 (footnote omitted).

The reason for the liberality is that unification of claims in a single action is more convenient and less expensive and time-consuming for the parties and the court. *Mosley v. General Motors Corp.*, 497 F.2d 1330, 1332 (8th Cir. 1974). In recognition of this attitude, the "transaction or occurrence" language of Rule 20 has been interpreted to "permit all reasonably related claims for relief by or against different parties to be tried in a single proceeding. Absolute identity of all events is unnecessary." *Id.* at 1333.

662*662 Although the events giving rise to plaintiffs' claims in this case occurred over a lengthy time period, they all are "reasonably related." The complaint sets forth a series of alleged unlawful detentions, searches, beatings and similar occurrences and charges defendants with "engag[ing] in a systematic pattern of harassment, threats and coercion with the intention of . . . depriving plaintiffs of [their] rights"; each of the incidents set forth is encompassed within the "systematic pattern." There is no logical reason why the systematic conduct alleged could not extend over a lengthy time period and, on the face of these allegations, there is nothing about the extended time span that attenuates the factual relationship among all of these events. The claims against the defendants "aris[e] out of the same transaction, occurrence, or series of transactions or occurrences" for purposes of Rule 20(a), and therefore joinder of defendants in this case is proper.

Apart from the procedural propriety of the joinder under Rule 20(a), however, there is a question whether a single trial of all claims against all defendants will prejudice some of the defendants. Some of the defendants were involved in only one of the several incidents alleged, and lumping them together with other defendants who were involved in more than one incident may be unfair. This problem is of particular concern with respect to the December 29, 1975 incident, which, apart from the allegations of direction, supervision, and control, appears to involve different actors than the other incidents alleged. Federal Rule 20(b) provides the court with power to remedy this situation:

"The court may make such orders as will prevent a party from being embarrassed, delayed, or put to expense by the inclusion of a party against whom he asserts no claim and who asserts no claim against him, and may order separate trials or make other orders to prevent delay or prejudice."

At oral argument, counsel for both sides recognized the potential prejudicial effect of the joinder in this case and suggested formulation of a stipulation which would attempt to remedy the problem. It appears, however, that it will be better to deal with the problem after discovery has been completed and the case is ready for trial. At that time, the degree of involvement of each of the defendants will be more clear and potential prejudice will be easier to assess. I therefore shall defer decision of this aspect of the case. I shall retain flexibility to sever portions of it or to take other remedial actions, if necessary, once the prejudice issue is more clearly focused.

[1] Joseph Kedra is named as a plaintiff in the body of the complaint but not in the caption. This oversight violated federal pleading rules (*see* Fed.R.Civ.P. 10(a); *Carrigan v. California State Legislature*, 263 F.2d 560, 567 (9th Cir.), *cert. denied*, 359 U.S. 980, 79 S.Ct. 901, 3 L.Ed.2d 929 (1959)) and should be corrected by amendment.

[2] The facts related in the text are as alleged in the complaint. For purposes of this motion, those allegations are taken as true. *See Estelle v. Gamble*, 429 U.S. 97, 99, 97 S.Ct. 285, 50 L.Ed.2d 251 (1976).

[6] The Federal Rules permit unlimited joinder of claims against an opposing party (Fed.R.Civ.P. 18(a)), but in multiparty cases joinder is limited by the requirement of Rule 20(a) that plaintiffs or defendants may not be joined in the same case unless some of the claims by or against each party arise out of common events and contain common factual or legal questions. Defendants have not argued that common factual and legal questions are not present in this case; the similarity of the claims against each defendant makes it abundantly clear that there are common issues. Once parties are joined under Rule 20(a), Rule 18(a)'s allowance of unlimited joinder of claims against those parties is fully applicable. *See* Advisory Committee on Rules, Note to 1966 Amendment to Rule 18.

SEEING THE FOREST FOR THE TREES: THE TRANSACTION OR OCCURRENCE AND THE CLAIM INTERLOCK CIVIL PROCEDURE

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Fl. Coastal L. Rev v.12 (2011)

II. THE TRANSACTION OR OCCURRENCE IN VARIOUS JOINDER DEVICES

A. *General Intent of Joinder Under the Rules*

The philosophy behind the federal joinder rules, and state rules-based systems, is to draw all factually-related claims and parties into a single lawsuit to promote convenience and efficiency to both the court and the parties.[24] It is the clear intent of the drafters of the federal rules.[25] It is clear in the rule on joinder of claims, which is to bring them all.[26] The leading early commentator on the rules clearly embraced this philosophy in his pithy summary: "The purpose . . . is to make 'one lawsuit grow where two grew before.'"[27] It is recognized clearly by the Supreme Court: "Under the Rules, the impulse is toward entertaining the broadest possible scope of action consistent with fairness to the parties; joinder of claims, parties and remedies is strongly encouraged."[28] It is clearly recognized by leading commentators today.[29]

Consequently, the attitude of a court should be to apply this overall philosophy. An earlier article explored compulsory counterclaim cases.[30] This Article continues that exploration through other joinder devices (cross-claims, permissive joinder of parties, and Rule 14 claims), pleading (pleading a claim, pleading in separate counts, and relation back of amendments), and interlocutory appeal in a case including multiple claims.[31] The conclusion follows that these rules form a consistent, interlocked system of procedure.[32]

B. *Cross-Claims*

A defendant is allowed to claim against another defendant—or a plaintiff against another plaintiff—only when the proposed cross-claim against the coparty arises from the same transaction or occurrence as a claim already within the litigation.[34]

Here too, the phrase is drafted and intended as a term of inclusion based on the policy to avoid multiple lawsuits and determine an entire controversy, i.e., "to settle as many related claims as possible in a single action."[35] A court should inquire whether the claim and cross-claim both arise from the same interrelated set of facts.[36] A few examples will suffice.

The paradigm case is *LASA Per L'Industria Del Marmo Societa Per Azioni v. Alexander*.[37] As part of construction of the city hall in Memphis, Tennessee, Italian corporation LASA supplied marble to subcontractor Alexander.[38] Unpaid, LASA filed suit against subcontractor Alexander, the prime contractor, the prime contractor's surety, and the city of Memphis.[39] Alexander then cross-claimed against the other three defendants and a third-party claim against the architect.[40] The prime contractor then counterclaimed against Alexander.[41]

This conglomeration of claims included subcontracts signed among different parties at different times, resulting in different damages, and involving different evidence on performance and breach.[42] The district court threw up its hands and disallowed the cross-claims, the counterclaim, and the third-party claim (treating it as a cross-claim) as not involving the "same transaction or occurrence."[43]

The Sixth Circuit reversed.[44] In effect, the appeals court asked the proper question: How many city halls were built?[45] The court began with the recognition that under the Federal Rules of Civil Procedure "the rights of all parties generally should be adjudicated in one action"[46] and concluded "[a]lthough different subcontracts are involved, along with the prime contract and specifications, all relate to the same project and to problems arising out of the marble used in the erection of the Memphis City Hall."[47] All parts of the dispute arose from a single construction project, which presented a single set of overlapping facts.[48] That is one transaction or occurrence.

One transaction or occurrence is also presented in various other cross-claim situations: the creation of a mortgage and a later buyer's promise to pay that mortgage involve the same ship,[49] a corporation that is sued for false registration statements asserts a breach of fiduciary duty against the individuals responsible for the statements,[50] the beneficiaries on six separate insurance policies are all changed at one time,[51] and employers who are sued for nonpayment of union pension contributions assert an industry trust fund's responsibility for the payments.[52] Even though all these cases involve separate and distinct legal relationships and separate evidence, they all involve interrelated facts. Law is irrelevant to the transaction or occurrence.[53]

Still, too many courts decide joinder of a cross-claim on improper considerations. The most common misconception is that a cross-claim does not arise out of the same transaction or occurrence when it involves a different legal theory.[54] Other considerations that have been improperly used to prevent joinder of a cross-claim are that it would

complicate the action,[55] hinder enforcement of the public policy supporting the original claim,[56] and improperly extend federal jurisdiction.[57] Other decisions disallowing cross-claims beggar explanation.[58] These decisions miss the point and should be denounced. The only proper consideration is whether the different claims arise from the same transaction or occurrence: interrelated facts that a layperson would expect to have tried together. A cross-claim arising from the same transaction or occurrence is to be allowed: any confusion or prejudice is to be handled by later order for separate trials.[59]

C. *Permissive Joinder of Parties*

1. History and Intent of Federal Rule Language

The history of permissive joinder of parties, and adoption of the "transaction or occurrence" standard, has already been written.[60] While former equity Rule 37 governed joinder of parties, the advisory committee did not follow it.[62] The "transaction" and "common question" requirements of the federal rule first appeared in the second draft.[63] The later added "or occurrence" and "series of transactions or occurrences" were drawn from English and state provisions: "The provisions for joinder here stated are in substance the provisions found in England, California, Illinois, New Jersey, and New York. They represent only a moderate expansion of the present federal equity practice to cover both law and equity actions."[64]

The language was broadened again and again as the committee attempted to draft a rule based on trial convenience and prevention of multiple lawsuits, instead of arcane legal distinctions,[65] and also to respond to tight-fisted interpretations of party joinder in some code decisions.[66]

The end result is a rule of party joinder based on the same intent and policies informing the whole of the federal rules: multiple lawsuits prevention, efficiency, convenience, and trial convenience.[67] Advisory committee reporter Charles E. Clark thought the permissive joinder of parties rule closely approached free joinder and the only substantial restriction would prove to be the common question requirement, not the transaction or occurrence requirement.[68]

The rule is based on facts, not historic legal relationships.[69] Perhaps one treatise states the rule best: "[T]he demands of several parties arising out of the *same litigable event* may be tried together, thereby avoiding the unnecessary loss of time and money to the court and the parties that the duplicate presentation of evidence relating to facts common to more than one demand for relief would entail."[70] Another commentator also has it right: "The transaction test in Rule 20(a) made the

focal element the cluster of real world events that constituted the social dispute. the 'transaction, occurrence, or series of transactions or occurrences.'"[71] The transaction or occurrence is one litigable event. one cluster of real world events, one set of facts. As with joinder of cross-claims,[72] and joinder of compulsory counterclaims. the proper question is how many events took place?[73]

2. Logical Relationship Ties Series of Transactions or Occurrences Together

The intent of the permissive joinder of parties rule is even clearer than the intent of other joinder rules. because the joinder of parties rule does not stop with a single transaction or occurrence. The test is "the same transaction. occurrence. or series of transactions or occurrences."[74] Surely. the addition of "series of transactions or occurrences" has added meaning. What is the added meaning? Many courts have opined that a "transaction or occurrence" in the context of a compulsory counterclaim can be recognized when a logical relationship exists between the claim and counterclaim.[75] This gloss is certainly not necessary and hardly helpful; it adds nothing to the words transaction or occurrence.[76] The "logical relationship" gloss may, however. be quite useful in recognizing a series of transactions or occurrences. Another way of saying the same thing is a series of transactions or occurrences is melded together by a logical relationship of overlapping facts.

A series of transactions or occurrences can be identified in many types of situations. A plaintiff joins multiple defendants whose actions contributed to the plaintiff's injuries. even though they did not act in concert or at the same time.[77] Multiple plaintiffs assert a pattern of misconduct by the same defendant.[78] A plaintiff asserts damages against subsequent owners of the plant where he worked.[79] Multiple plaintiffs assert the same wrong perpetrated on them by the same defendant.[80] These are all transactions or occurrences tied together in a logical relationship. best summed up by the following U.S district court:

> Imagine a number of "transactions or occurrences" spread out through time and place. They are not directly continuous, or else they would constitute one transaction or occurrence rather than a number of them. What would make them a "series?" The answer is some connection or logical relationship between the various transactions or occurrences. The thing which makes the relationship "logical" is some nucleus of operative facts or law-the second prong of the 20(a) test. If the phrase "series" is to have any real meaning whatsoever, it necessarily must entail some "logical relationship" between the specific transactions or occurrences. Thus, Rule 20 itself contemplates a "logical relationship" definition.[81]

Finally, a worthwhile use of gloss. In all these cases, the courts recognize the logical relationship tying a series of transactions or occurrences together and apply the intent and policy of the permissive joinder rule by allowing the joinder.[82]

The logical relationship gloss on the transaction or occurrence can probably be traced to a pre-rules case in which the Supreme Court famously said, "'[t]ransaction' is a word of flexible meaning. It may comprehend a series of many occurrences, depending not so much upon the immediateness of their connection as upon their logical relationship."[83] Most quotes end there.[84] The next sentence is, "[t]he refusal to furnish the quotations is one of the links in the chain which constitutes the transaction . . . ."[85] This concept of links in the chain is a good way to think about a series of transactions or occurrences, as the Supreme Court later recognized as much.[86]

3. Permissive Joinder Shrinks over the Years

The original intent of permissive joinder to allow almost free joinder of parties was part and parcel of the overall philosophy of the federal rules, which was to handle all aspects of a dispute in one proceeding; the words of the rule were carefully chosen for this purpose.[87] Despite this clear intent, over the years, courts have been more and more willing to seize on the words of the rule for exclusion, rather than

for inclusion of additional parties, they continue to be "skeptical of a natural unity to disputes."[88]

The court started well in *Mosley v. General Motors Corp.*[89] Ten plaintiffs sued on behalf of themselves and others similarly situated for racially discriminatory practices by their employer.[90] The court of appeals recognized "a company-wide policy purportedly designed to discriminate against blacks in employment similarly arises out of the same series of transactions or occurrences."[91] The court also wrote of the proper attitude in cases involving joinder of parties:

> The purpose of the rule is to promote trial convenience and expedite the final determination of disputes, thereby preventing multiple lawsuits. Single trials generally tend to lessen the delay, expense and inconvenience to all concerned. Reflecting this policy, the Supreme Court has said:
>
> Under the Rules, the impulse is toward entertaining the broadest possible scope of action consistent with fairness to the parties; joinder of claims, parties and remedies is strongly encouraged.[92]

The court of appeals recognized, "[a]bsolute identity of all events is unnecessary" since "all 'logically related' events entitling a person to institute a legal action against another generally are regarded as comprising a transaction or occurrence."[93] All of this language was appropriate and helpful. Indeed, for many years, every permissive joinder of parties decision routinely cited *Mosley*,[94] and it remains the leading case today. The problem is that the *Mosley* opinion is thin,[95] and courts citing it frequently only quote the general language defining transaction, while proceeding to ignore both the result of the case and the attitude toward broad joinder.

To be sure, many decisions demonstrate an appropriately generous attitude toward party joinder.[96] Unfortunately, far more are hostile to party joinder—and thus to the general philosophy of the federal rules.[97] How else can one explain decisions based on inappropriate considerations?[98] Lower courts keep making restrictive joinder of parties decisions, and the drafters of the rules keep amending the rules to eliminate these restrictive interpretations.[99] While raw numbers are a crude measure, they can be instructive. The main volume of a leading treatise on federal procedure collected thirty-five cases interpreting the transaction or occurrence requirement in permissive joinder cases: ten courts concluded the requirement was satisfied and twenty-five courts concluded it was not.[100] Even more startling is the most recent supplement to the same treatise: the number of cases concluding the facts constitute the same transaction, occurrence, or series of transactions or occurrences is zero, while the number of cases concluding the opposite is twenty-eight.[101] The convenience and economy of joinder that could be achieved in many of these twenty-eight cases is readily apparent.[102]

D. Additional Claims Under Rule 14

A defending party is allowed to bring a third-party claim against a person "who is or may be liable to it for all or part of the claim against it."[117] Since the test does not employ the transaction or occurrence, the standard third-party claim is not part of this Article. The rule continues, however, into an area that is germane. The third-party defendant may assert directly against the original plaintiff "any claim arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff."[118] And the original plaintiff may assert directly against the third-party defendant: "[A]ny claim arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff."[119] Sometimes these claims are loosely termed counterclaims or cross-claims, but a better term is Rule 14 claims.[120]

As with other joinder devices, the key requirement for a Rule 14 claim is the transaction or occurrence, which again "is to avoid circuity of action and multiplicity of suits."[121] So too, the method of identifying the transaction or occurrence in Rule 14 claims is similar, which is that the proposed "claim involves some of the same evidence, facts, and issues as does the original action so that litigation economy will result from allowing it to be added to the lawsuit."[122] Again, the court should look to the facts—not the legal theories—of the litigation.

The archetypal Rule 14 claim case is *Revere Copper & Brass Inc. v. Aetna Casualty & Surety Co.*[123] Revere decided to build a manufacturing plant for metals. Fuller entered into contracts to construct the plant, and Aetna executed bonds to secure the performance of Fuller.[124] When Revere sued on the bonds against Aetna, Aetna brought Fuller in as a third-party defendant because of its agreement to indemnify Aetna.[125] Third-party defendant Fuller in turn brought a Rule 14 claim against plaintiff Revere for breach of warranty and negligence.[126] The court swept aside arguments that different contracts and different bodies of law were involved in its focus on the facts of the dispute: "The theory adopted in the new rules . . . has been that the 'transaction' or 'occurrence' is the subject matter of a claim, rather than the legal rights arising therefrom; additions to or subtractions from the central core of fact do not change this substantial identity . . . "[127] As had the court in the leading cross-claim case,[128] the court properly recognized that all claims arose from a single construction project: "It is easily seen that Fuller's claim arises out of the aggregate of operative facts which forms the basis of Revere's claim in such a way to put their logical relationship beyond doubt. The two claims are but two sides of the same coin."[129]

Focusing on a single event is often helpful in identifying th related facts that constitute a single transaction or occurrence. For ex ample, the collision of two boats allows joinder of parties, a cross claim, a counterclaim, a third-party claim, and a Rule 14 claim bac against the plaintiffs, because all of the joined claims arise from a singl boating collision even though the legal theories of the various claim differ greatly.[130] And a Rule 14 antitrust claim is allowed against plaintiff proceeding on a breach of contract theory, because both claim arise from "the same basic controversy between the parties."[131]

Even concentration on a single event may be too narrow t bound a transaction or occurrence. A better boundary may be the whol of the continuing relationship among parties. When a plaintiff corpora tion sued a defendant bank for negligently permitting one of the plain tiff's managers (Kerr) to draw checks on the plaintiff's account payabl to the manager's controlled corporations, the bank asserted a third-part claim against the manager and the controlled corporations.[132] The thir parties in turn filed a Rule 14 claim against the plaintiff for service rendered in establishing and managing a branch office for the plain tiff.[133] The court had no difficulty recognizing the common transactio or occurrence:

> Viewed in their totality, we think the Kerr claims must be regarded as arising out of the transaction or occurrence that is the subject of the plaintiff's claim. The transaction involved was the establishment of the Philadelphia office, Kerr's appointment as manager, and his conduct in respect to the management of the office. . . . The issue, then, will be the propriety of any payments to Kerr for services. The counterclaims [Rule 14 claims] are claims for additional services rendered by Kerr and allegedly unpaid. We regard the 'transaction' as being the whole relationship between plaintiff and Kerr and hence we conclude that, if otherwise maintainable, the Kerr claims fall within the ambit of Rule 14.[134]

Few reported decisions include Rule 14 claims. Those few cases properly identify the same transaction or occurrence as a common set of facts, often seen because the facts cluster around a single common event.[135]

Joinder and Amendment Problem

Stuart and Sarah Buck and Wanda Willie served one complaint with a summons on Fresh Flowers, Inc. ("FF") on January 5, 2010. The plaintiffs allege that the Bucks have lived on Braesvalley in Houston Texas, five doors down from Wanda Willie. They allege the Bucks retained FF in January 2008 to deliver fresh flowers to their house once every two weeks under an agreement that the Bucks had with FF. The Bucks provided FF a key to their home. The complaint further alleges that Willie had the same deal with FF beginning in February 2008, and that Willie also gave the company a key to her house. The complaint further alleges that on Friday, March 8, 2008, the Bucks' house was negligently left unlocked by FF and that, as a result, their house was burglarized that day and $15,000 worth of property was stolen. The complaint further alleges that on Friday, April 12, 2008, the Willie house was negligently left unlocked by FF and that, as a result, her house was burglarized that day and $9,000 worth of property was stolen. The plaintiffs seek damages in these amounts, plus interest, and demand a jury trial.

No discovery has taken place yet. Assume that if an employer is held responsible because of an employee's negligence, the employer has a cause of action for indemnification from the employee under Texas law.

January 2008	Bucks enter agreement with FF
February 2008	Willie enters agreement with FF
March 8, 2008	Bucks' house burglarized
April 12, 2008	Willie house burglarized
January 5, 2010	Bucks and Willie file suit against FF

1. If FF moves under Rule 21 to sever the claims of the Bucks and Wanda Willie into separate actions on the ground that under Rule 20 the plaintiffs may not join together as co-plaintiffs, how should the court rule, and why?

2. On March 15, 2011, the Bucks move to amend the complaint to add a count against FF for negligently ruining their fine linen tablecloth. They claim that on March 1, 2008 flowers were delivered to them that leaked and that their tablecloth was ruined. They allege that they told FF of the damage on March 9, 2008, the same day that they say they also reported the burglary to FF. Assume that all relevant statutes of limitation are two years. How should the court rule if FF opposes this amendment?