

MODEL ANSWER FOR Q1 FROM FALL 2014 EXAM

ISSUE

The issue we are asked to address is whether the defendant, Aquaslide, should be given permission to amend its answer under Rule 15(a)(2). To answer that question completely, I will begin by briefly explaining why leave to amend is even required—which is to say, why this is a problem under Rule 15(a)(2) instead of Rule 15(a)(1), which gives parties a limited period to amend its pleading without having to ask for leave. After showing that Aquaslide can only amend with the court’s permission, I conduct a Rule 15(a)(2) analysis to determine whether the defendant’s motion should be granted.

RULE DISCUSSION

(WITH SOME LIMITED APPLICATION OF THE LAW TO THE EXAM FACTS, WHEN APPROPRIATE)

1. Why is leave to amend even required—which is to say, why this is a problem under Rule 15(a)(2) instead of Rule 15(a)(1)?

In some instances, it is not necessary for a party to ask permission to amend its pleading. This is not one of those cases, however. Rule 15(a)(1)(a) applies to amendments to answers. It provides that a “party may amend its pleading once as a matter of course no later than 21 days after serving it.” Although the rule itself does not define the phrase “as a matter of course,” the rule’s language is understood to refer to the right to amend without having to ask the court for permission to do so. Although we did not read any cases that reflect this common understanding, the rule language and structure itself make this clear. Rule 15(a)(1) permits a party to amend, but only one time (“A party may amend its pleading once...”); thereafter, Rule 15(a)(2) governs (“In all other cases, a party may amend its pleading only...”).

According to the exam prompt, the defendant filed its answer on December 12, 2013 and is now seeking to amend after November 2014—far beyond the narrow 21-day window for amending as a matter of course under Rule 15(a)(1).

Before getting to the main issue, one last side note about “matter of course” amendments. Rule 15(a)(1) has a second subpart, Rule 15(a)(1)(B), but we don’t need to consider that part because it does not apply to this problem. Rule 15(a)(1)(B) only applies to a pleading “to which a responsive pleading is required.” Here, the pleading that the defendant wants to amend is an answer, which is not a pleading to which a responsive pleading is required. Under Rule 7, responsive pleadings are not normally required to answers. Under Rule 7(a)(7), the only time that a pleading is required to an answer is in a special circumstance in which a court orders a reply be filed. In this problem, as is common, the court did not order the plaintiff to reply to the defendant’s answer—so it remains a pleading to which no responsive pleading is required under the rules.) As a result, the only part of Rule 15(a)(1) that potentially applies to this problem is Rule 15(a)(1)(A) and, as shown above, it does not give the defendant permission to amend without leave of court.)

2. Examining leave to amend under Rule 15(a)(2)

According to the rule's text, absent consent from the other side, a party can ask the court's permission to amend, which a court "should freely give . . . when justice so requires." This language has been interpreted "liberally"—meaning that courts will err on the side of granting motions for leave to amend and will only hesitate to do so if a defined set of recognized factors justifies not granting leave. For the most part, these factors have been uniformly applied by courts, though there is one important exception relating to one of the factors that I will discuss below. In this section, I walk through the commonly cited reasons why courts deny leave to amend. The first reason commonly cited, undue delay, also happens to be the place where there's some inconsistency in judicial application—so I'll also address what that inconsistency is in this part. After discussing undue delay, I explore the other justifications courts point to for denying leave to amend.

A. Undue delay as a reason for denying leave to amend

One reason, and usually the first one cited, why courts deny leave to amend under Rule 15(a)(2) is if the party seeking leave to amend only did so after "undue delay." The concept of undue delay seems to mostly be about the *undue* part, not the *delay* part. Although length of time bears some relevance, the mere passage of time does not, by itself, seem to make a delay undue. As evidence of this point, consider that in *T-Mobile* the court cited several cases where leave to amend was properly granted after delays of several years (two cases mention delays of more than four years), reflecting that the mere passage of time is not what usually makes a delay *undue*. Instead, what really seems to justify denying leave to amend under this first reason is if there's been "an inordinate delay," one where "no satisfactory explanation is offered for the delay[.]" *T-Mobile*. This is the same understanding the court articulated in *Spencer* when it noted that in determining if a delay is undue, "we consider both the length of the delay and the reason for its occurrence." Thus, in *Spencer*, because the court concluded that the facts in support of the proposed amended claim were known to the plaintiff seven months earlier, it refused to grant leave to amend because it found the plaintiff's delay in asking for permission to amend to be undue. By contrast, in *T-Mobile* the court found that the plaintiff acted sought leave to amend promptly after learning of new facts that supported the new claims it wanted to add—so no undue delay had occurred. In short, in examining if there's been undue delay, we're primarily focused on whether the amending party had a good reason for waiting as long as it did before asking permission to amend.

Before leaving undue delay, I want to briefly point out that there's not uniformity among the courts in applying this first justification for denying leave to amend. Some courts (such as the Tenth Circuit, as illustrated by the *Spencer* case) believe that if the party seeking leave to amend acted with undue delay, then that can be an independent reason for a district court to justifiably deny leave to amend. By contrast, other courts (such as those in the Second Circuit, as illustrated by cases like the *T-Mobile* case), do not think it justifiable to withhold permission to amend if there has only been undue delay. According to these courts, undue delay alone is not enough; some other factor must also be present to justify denying leave. I will explore whether there was undue delay based on the exam prompt facts in more detail below in the application section.

B. Other reasons why courts will deny leave to amend

Beyond undue delay, other reasons why courts will deny leave to amend include “bad faith” (sometimes also referred to as “dilatory motive”); futility; or “undue prejudice” to the non-moving party. *See T-Mobile*. Another reason cited by courts to deny leave to amend is if there has been “repeated failures to cure deficiencies by amendments previously allowed.” *See Spencer and Witkowski*. Finally, beyond Rule 15(a)(2), a court may deny leave to amend if the amendment is sought after a scheduling order deadline for amending pleadings has passed and the party seeking the amendment does not offer good cause for why it is asking for an amendment at such a late date. *See* Rule 16(b)(4); *Cage*.

1. Bad faith/dilatory motive

We did not read much about what constitutes bad faith/dilatory motive. Indeed, even the *T-Mobile* court noted that, at least in the Second Circuit, there isn’t much law on this topic. The *T-Mobile* court did go on to say however that the case law reflects that bad faith/dilatory motive exists if the amendment embodies “unfair strategic maneuvering.” And it cited another case in which the court denied leave to amend because it found the plaintiff was seeking strategic advantage by waiting to advance certain claims until after the court had made other rulings related to choice of law. I will explore this factor in more detail below in the application section.

2. Futility

According to the *Cage* case that we read, an amendment is futile if it would not survive summary judgment dismissal. Presumably, although the case does not say it, an amendment would also be futile if it would be dismissed on any other basis, such as under Rule 12(b)(6) or 12(c). Here, the prompt does not indicate that there would be anything futile in allowing this amendment (indeed, granting the motion might have a very pointed consequence, as I discuss below), making this factor not applicable and so I will not discuss it further.

3. Repeated Failures to cure deficiencies by previous amendments

We did not read any cases on this factor but presumably it simply means what it says: a court will also be justified in denying leave to amend if it has previously granted leave to cure deficiencies that were not cured. Here, the prompt does not indicate there were prior amendments, making this factor applicable and so I will not discuss it further.

4. Amendment after scheduling order deadline

A penultimate reason for denying leave to amend is if the amendment is sought after a scheduling order deadline for amending pleadings has passed and the party seeking the amendment does not offer good cause for why it is asking for an amendment at such a late date. However, the prompt does not indicate anything about a scheduling order deadline, making this factor inapplicable and so I will not discuss it further.

5. Undue Prejudice

The final reason that a court may deny leave to amend is if the amendment would cause undue prejudice. According to the *T-Mobile* case, in deciding whether undue prejudice would result, courts consider three possibilities: would the amendment (1) require the opponent to expend significant additional resources to conduct discovery and prepare for trial; (2) significantly delay resolution of the case; or (3) prevent the plaintiff from bringing a timely action in another jurisdiction. The inquiry into undue prejudice is a balancing test, *T-Mobile* notes, where the potential prejudice to allowing the amendment has to be weighed against the prejudice of denying it. I do note that one limitation I face in analyzing undue prejudice is that we did not read any cases in which a court either found undue prejudice to exist or found that it did not exist. As a result, the only account of the law we have is the black letter description of it I have provided above.

APPLICATION OF LAW TO FACTS

1. There is a strong argument to be made that the defendant acted with undue delay in seeking leave to amend

As noted above, the relevant question in examining if there's been undue delay is whether the amending party had a good reason for waiting as long as it did before seeking permission to amend its answer. *See T-Mobile; Spencer*. Thus, applied to the exam prompt facts, the Rule 15(a)(2) question relating to undue delay is this: did Aquaslide have a good reason for waiting as long as it did before conducting its own inspection of the slide, rather than just relying on the inspections conducted by the insurance companies? I conclude that, while its reliance on the insurance companies is probably enough (absent other evidence) to show it did not act in bad faith (more on this below), for purposes of delay we can say that Aquaslide was not justified in waiting as long as it did, making its delay undue in seeking to amend its answer to deny manufacture of the slide.

In finding that there was undue delay by the plaintiff in seeking to amend, in *Spencer* the court emphasized that the focus should be on whether facts were known “or should have been known” to the plaintiff. *Spencer* concluded that the plaintiff’s proposed amended claims were based on facts that the plaintiff knew or should have known from the time the suit was originally filed. Here, the information on which Aquaslide wants to base its amended answer—that it was not, in fact, an Aquaslide product—also were either known or could have been known to Aquaslide before it filed its answer. Consider how long Aquaslide waited to underline how much delay there was. While the length of the delay, by itself, does not make it undue, recognizing all that transpired during the delay is relevant to determining if it was undue. Here, the company first learned about the accident in October 2012 when the rec center’s insurer sent it a letter advising that one of its slides was involved. That letter asserted that the slide was an Aquaslide model—even specifically naming the model itself: a “Queen Model” slide.

Certainly, Aquaslide realized right away the potential financial risk of the injury: it immediately forwarded the letter it received from the rec center's insurer to its own insurer, putting its carrier on notice of a potential legal claim against it. Aquaslide presumably also could have conducted a review of its own company records to determine if any of its "Queen Model" slides had been sold in Hammond Indiana—or to have checked to see if it had supplied this model slide to the distributor, Purity. It may also have been possible for it to ask Purity to check its own records. The exam prompt does not indicate that Aquaslide did any of these things—nor is there any indication from the exam prompt that these sorts of steps would have been practically infeasible.

Instead, the exam facts indicate that Aquaslide did nothing other than wait to receive the report from its own insurance company. That report then arrived in September 2013 advising Aquaslide that its insurer was confident the slide was made by Aquaslide. Suit was then filed in October 2013, whereupon Aquaslide waited another two months before it had to file its answer, which it did in December. This two-month gap is itself notable as we know that normally, absent waiver of service, a defendant has only 21 days to answer a complaint. *See* Rule 12(a)(1)(A)(i).

(Although the exam facts are silent on this point, and certainly do not mention anything about waiving service, Aquaslide may have asked for and received an extension of time from the plaintiff to file its answer.) Whatever the reason why it was able to gain extra time to file its answer, we know for sure that during the two months in which it had to answer the complaint, the record again does not reflect any additional actions Aquaslide took before it finally filed its answer with its admission that it had manufactured the slide. In total, then, more than a year had elapsed from the time it was first alerted of an accident potentially involving one of its products before it filed its answer admitting it was, indeed, the manufacturer.

And just as Aquaslide was aware of the significant financial risks of the suit when it first notified its insurance company of a potential claim against it back in late 2012, so too Aquaslide should have been aware of the significant litigation risk of filing an answer that admitted the slide was its product. As Rule 8(b)(6) explicitly puts it, an allegation "is admitted if a responsive pleading is required and the allegation is not denied." Yet, before it made this important admission in its December 2013 answer, it had ample time—more than a year—to confirm for itself that the slide in question was an Aquaslide product. That it chose to rely on what the rec center's insurer and its own insurer reported, without doing any investigation on its own was a choice that it made. Having made that choice, they must live with its consequences. For this reason, I conclude that Aquaslide has offered "no satisfactory explanation" for its delay in seeking leave to amend. By comparison, the only example we have of a case where there wasn't undue delay was *T-Mobile*, where the court found no undue delay because a new event occurred that justified the plaintiff waiting as long as it did to seek amendment. Here Aquaslide could have done its own investigation before filing its critical admission. Thus, under both *Spencer* and *T-Mobile*, there's a strong argument that Aquaslide's delay was undue.

Having concluded that there's a strong argument Aquaslide has acted with undue delay in seeking to amend its answer, it is necessary to note again that there's a split in the courts about whether undue delay, standing alone, is an independent justification for denying leave to amend. Because we know some courts say undue delay is not enough, we need to consider other factors. The two other potentially relevant factors that could apply to this exam prompt are bad faith/dilatory motive and undue prejudice (I have already summarily dispensed, above, with the

possibility that other factors could be applicable to this problem). Thus, I turn first to bad faith/dilatory motive before ending with undue prejudice.

2. A court probably should not find that there was bad faith/dilatory motive by Aquaslide.

As discussed above in the rule discussion, bad faith/dilatory motive is said to relate in some way to “strategic maneuvering” by the party seeking to amend. That framing suggests an intentional decision to delay asking for leave to amend. The exam facts point to negligent behavior by Aquaslide, but they do not reflect any intentional strategic maneuvering. Aquaslide’s reliance on the confident conclusions of the two insurers (and, especially, of course, the confident conclusion of its own insurer that the product in question was “definitely” an Aquaslide product) seems particularly relevant to the bad faith analysis. Absent any facts pointing to strategic maneuvering by Aquaslide to influence its insurer to reach this faulty conclusion, we cannot say that Aquaslide acted with bad faith in filing what it now believes to be a mistaken admission.

Of course, if the plaintiff could demonstrate some such intent—perhaps, for example, by finding other instances when Aquaslide similarly waited until it was too late for an injured person who had sued it to sue the correct defendant—then that would be different. But based only on the bare exam facts given, this factor does not seem to be met.

3. There is, however, a strong argument to be made that allowing the amendment would cause undue prejudice to the plaintiff.

However, there is a much stronger basis for finding that it would unduly prejudice the plaintiff to allow the amendment. If allowed, then the defendant would be able to offer proof that the slide at issue wasn’t one it manufactured. And if a jury believed that evidence and on this basis rendered a verdict for Aquaslide, then the plaintiff would likely be unable to sue the correct defendant because the statute of limitations has now expired. As noted above, this scenario appears to have been specifically contemplated as a potential reason for finding undue prejudice. As a reminder, the third consideration listed by the *T-Mobile* court reads: “In deciding whether undue prejudice exists, courts should consider whether the new claim would “prevent the plaintiff from bringing a timely action in another jurisdiction.” Although the court does not say it, there’s no principled reason why the concern about preventing the plaintiff from bringing another timely action should be limited only to suing the same defendant in another jurisdiction; misleading the plaintiff into failing to timely sue the correct defendant would seem to raise identical prejudice concerns.

To be sure, there are two critical assumptions to this conclusion—that (1) a jury would be convinced by Aquaslide’s evidence and (2) the statute of limitations would then bar the plaintiff from bringing a timely action against the correct defendant. I examine each of these assumptions now to see how they impact the undue prejudice analysis.

The jury. While it is possible that a jury might disbelieve Aquaslide, that possibility does not seem sufficiently remote to justify altering the undue prejudice analysis. To be sure, we don’t have a case where a court decided that undue prejudice did or did not exist and so can’t compare the exam facts with those of another case. That said, we do know that the analysis of undue

prejudice always require a balance between weighing “potential” prejudice to permitting the amendment as opposed to disallowing it. *See T-Mobile*.

And so I conclude that the potential possibility a jury would believe Aquaslide did not make the slide outweighs the prejudice Aquaslide will face if it has to defend with its admission in place that it built the slide. Just as a jury might not necessarily rule for Aquaslide if it offered evidence that it wasn’t the slide’s manufacturer, a jury also might not rule for the plaintiff if the case goes to trial: Aquaslide could still prevail on other grounds (e.g., inadequate proof of negligence or of damages, etc.). And given that Aquaslide is to blame for what it claims was an erroneous admission, I conclude that the balance of potential prejudice justifies denying leave to amend.

Statute of limitations. The other assumption in this analysis is that the plaintiff would be barred by limitations from suing the correct defendant. That may not be right. For instance, state law might recognize equitable tolling in such a situation like this, where a defendant misleads a plaintiff into believing he has sued the correct defendant and only corrects the error after limitations has run. But we aren’t told anything about state law—and I will add that equitable tolling against an innocent third party (that is, a third party not responsible for misleading the plaintiff into believing the product it had actually manufactured was, in fact, manufactured by someone else) seems like an extreme result for the law to allow. So rather than putting all the risk of loss on an innocent plaintiff, or on an innocent third party, it seems more appropriate to conclude that Aquaslide, the party responsible for making the misleading admission, should bear the greater risk of prejudice. This seems precisely the kind of balancing of prejudice that the case law requires.

Finally, I’ll note briefly that we are also not told anything about whether relation back law might revive the otherwise-barred claim. We have not yet studied Rule 15(c) so for purposes of this answer I won’t address that possibility at length. I will note, though, that it is unlikely that federal relation back law would permit relation back of the plaintiff’s claim against a newly-named party—assuming the newly-named party did not have any notice of the action and neither knew nor should have known that but for a mistake it would have been named in the case.

CONCLUSION

My conclusion is that a court should deny leave to amend because (1) there likely was undue delay by Aquaslide in seeking leave to amend and (2) allowing the amendment would cause more potential prejudice to the plaintiff than to Aquaslide. And since Aquaslide is the one responsible for making the misleading admission, the balance of potential prejudice supports the conclusion that the court should deny Aquaslide’s motion.