

10-1-2010

## The 2009 Amendment to Federal Rule 15(a)(1) - A Study in Ambiguity

Susan E. Hauser

Follow this and additional works at: <https://archives.law.nccu.edu/ncclr>



Part of the [Civil Procedure Commons](#)

---

### Recommended Citation

Hauser, Susan E. (2010) "The 2009 Amendment to Federal Rule 15(a)(1) - A Study in Ambiguity," *North Carolina Central Law Review*: Vol. 33 : No. 1 , Article 3.  
Available at: <https://archives.law.nccu.edu/ncclr/vol33/iss1/3>

This Article is brought to you for free and open access by History and Scholarship Digital Archives. It has been accepted for inclusion in North Carolina Central Law Review by an authorized editor of History and Scholarship Digital Archives. For more information, please contact [jbeeker@nccu.edu](mailto:jbeeker@nccu.edu).

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

SUSAN E. HAUSER\*

*“Procedure is a means to an end, not an end in itself; and, often necessarily, its rules must be applied to do justice in the particular case, whatever the doubts raised as to the future.*

. . .

*Since even rule-making can never be wholly successful, we must spend our time trying to catch up with the mistakes and patch up the structure!”<sup>1</sup>*

Since the adoption of the Federal Rules of Civil Procedure in 1937,<sup>2</sup> Rule 15(a)(1) has allowed pleadings to be amended one time, as a matter of course, within a set and limited period of time.<sup>3</sup> Rule 15(a)(1) was amended on December 1, 2009 to change the time limits for these as of course amendments.<sup>4</sup> The 2009 amendment was on the horizon for many years, and its drafters made every effort to clearly explain its purpose and their intentions.<sup>5</sup> Despite this, however, the amendment was drafted in a way that creates an ambiguous result when thoughtfully applied to pleadings that state a claim for relief.<sup>6</sup>

---

\* Associate Professor, North Carolina Central University School of Law. I am grateful to Jowanda E.C. Jones, Class of 2012, NCCU School of Law, and to Khimmara Greer, Class of 2011, NCCU School of Law, for their excellent research assistance. I would also like to thank Jaamal Jennings, Class of 2012, NCCU School of Law, for asking the question that prompted this article.

1. Charles E. Clark, *Special Problems in Drafting and Interpreting Procedural Codes and Rules*, 3 VAND. L. REV. 493, 498 and 507-08 (1950).

2. See Charles E. Clark, *The Role of the Supreme Court in Federal Rule-Making*, 46 J. AM. JUD. SOC. 250, 251 (1963). (The Federal Rules of Civil Procedure were adopted by the United States Supreme Court in 1937 and became effective on September 16, 1938.).

3. FED. R. CIV. P. 15(a)(1) (2009) (amended 2009); see 3 JAMES WM. MOORE ET AL., MOORE’S FEDERAL PRACTICE § 15App.01[1] (3d ed. 2010) (indicating in 2007 that “[s]ubdivisions (a) and (b), dealing, respectively, with Amendments and Amendments to Conform to the Evidence, stand substantially as promulgated in 1937”).

4. FED. R. CIV. P. 15(a)(1); see also *August 2007 – December 2009 Amendments*, U.S. COURTS (December 1, 2009), <http://www.uscourts.gov/RulesAndPolicies/FederalRulemaking/CompletedRules/Aug07Dec09Amendments.aspx>. (The 2009 amendment to Rule 15 was proposed in August of 2007 as part of a package of amendments that became effective on December 1, 2009.).

5. See *infra* Part I. C.

6. Pleadings that state a claim for relief include the complaint, an answer that states a counterclaim, any pleading that states a cross-claim, and a third-party complaint. FED. R. CIV. P. 7(a). In the interest of simplicity, the complaint will be used throughout this article to illustrate

Before the 2009 amendment to Rule 15(a)(1), it was clear that the time for filing an as of course amendment to the complaint, or any other pleading stating a claim, ended with the service of a responsive pleading.<sup>7</sup> However, in modern litigation, the time for filing a responsive pleading is frequently prolonged by one or more extensions of time, as well as, by the filing of motions under Rule 12.<sup>8</sup> Because these events did not impact the plaintiff's time for amending her complaint as a matter of course under the pre-amendment version of Rule 15(a)(1), the rule typically allowed the plaintiff to enjoy a lengthy period to refine her complaint outside the trial judge's supervision.<sup>9</sup> The 2009 amendment to Rule 15(a)(1) was intended to curtail this possibility by limiting the plaintiff's as of course amendment to a period ending twenty-one days after the service of the earlier of a responsive pleading or motion under Rule 12(b), (e), or (f).<sup>10</sup>

The amendment accomplishes this goal, however, it is drafted in an unfortunate manner that introduces ambiguity into the previously clear timing for as of course amendments to pleadings that state a claim, including the complaint. In fact, in its current form, the amended rule is capable of no fewer than three alternative interpretations when applied to pleadings that state a claim.<sup>11</sup> Although the amendment is still new, early discussions of the amended rule in judicial opinions and treatises reveal a great deal of unwitting confusion about the timing of amendments under this rule.<sup>12</sup>

The first and most obvious reading of amended Rule 15(a)(1) looks to the plain language of the rule to allow one amendment to the complaint as a matter of course within two discrete – but possibly disconnected – time periods: first, for a period of twenty-one days after the complaint is served, and then, again for a second period of twenty-one days after service of the earlier of a responsive pleading or Rule 12 motion.<sup>13</sup> Although this reading follows the literal language of the amended rule, it will frequently produce an anomalous gap during the

---

the ambiguity introduced by the 2009 amendment; however, this ambiguity is equally present in any other pleading that states a claim.

7. FED. R. CIV. P. 15(a) (2009) (amended 2009). In the most common paradigm, the service of the answer terminated the plaintiff's right to amend her complaint as a matter of course.

8. FED. R. CIV. P. 12.

9. See *infra* notes 98-100 and accompanying text.

10. The ending date of this time period is clear under the amended rule. The ambiguity is created by the amendment's failure to specify the event that triggers the beginning of the period. See *infra* Part II.

11. See *infra* Part II.

12. See *infra* Part II.

13. See *infra* Part II. A.

## 12 NORTH CAROLINA CENTRAL LAW REVIEW [Vol. 33:10]

amendment period,<sup>14</sup> and it does not accurately express the stated purposes of the amendment.<sup>15</sup>

The second plausible interpretation of amended Rule 15(a)(1) allows the complaint to be amended once as a matter of course for a twenty-one day period that begins with the service of the earlier of either the answer or Rule 12(b), (e), or (f) motion.<sup>16</sup> Although this is not the cleanest reading of the amended rule, it is consistent with the structure of the prior version of Rule 15(a)(1) and creates synchrony between the amended rule's application to the answer – which is clearly and unambiguously governed only by Rule 15(a)(1)(A) – and its application to the complaint, which under this interpretation is governed only by Rule 15(a)(1)(B).<sup>17</sup> However, this interpretation reduces the time for as of course amendments to complaints to one twenty-one day period with a start-date controlled by the defendant.<sup>18</sup> It also produces an even larger and earlier procedural gap, during which no amendment as of course will be possible.<sup>19</sup> For these reasons, it is also unlikely that this interpretation expresses the intended meaning of the amended rule.

Finally, the third possible interpretation of the amended rule allows the complaint to be amended for a period that begins with the service of the complaint and continues, without interruption, until twenty-one days after the service of the earlier of either the answer or a motion under Rule 12(b), (e), or (f).<sup>20</sup> This interpretation is not found in the plain language of the rule and has the least textual support. Nevertheless, it produces the most common-sense result and best expresses the meaning of contemporaneous statements of intention made by the drafters of the amended rule.<sup>21</sup>

An early survey of judicial decisions applying the amended rule reveals that trial judges are responding to the unnoticed ambiguity in amended Rule 15(a)(1) by reading the rule in different ways with little discussion.<sup>22</sup> Reasonably enough, almost all of these decisions adhere to the plain language of the amended rule and follow the first or second interpretations, even when this produces an anomalous result and even though these interpretations are inconsistent with one another and with the stated aims of the amendment's drafters.<sup>23</sup> This inconsis-

---

14. See *infra* Part II. A.

15. See *infra* notes 102-06 and accompanying text.

16. See *infra* Part II. B.

17. See *infra* Part II. B.

18. See *infra* Part II. B.

19. See *infra* Part II. B.

20. See *infra* Part II. C.

21. See *infra* Part I. C.

22. See *infra* Part II.

23. See *infra* Parts II. A-B.

tency is also reflected in major treatises on federal practice and procedure, which have interpreted amended Rule 15(a)(1) in different ways.<sup>24</sup>

Over time, this inconsistency promises to cause harm in several ways. First, an ambiguity in Rule 15(a)(1) that causes procedural variances stands to undermine the principle of uniformity that grounds the Federal Rules of Civil Procedure. This lack of uniformity makes the process of litigation less predictable for all parties, attorneys, and judges involved. Second, and more pragmatically, the first and second possible readings of amended Rule 15(a)(1) establish an unnecessarily short period for plaintiffs to amend complaints as a matter of course. The plaintiff's right to amend the complaint without the court's leave assumes more importance in light of the heightened pleading standards recently adopted by the United States Supreme Court in *Ashcroft v. Iqbal*<sup>25</sup> and *Bell Atlantic Corp. v. Twombly*.<sup>26</sup> Furthermore, given the wide-spread impact of the *Iqbal/Twombly* decisions on federal litigation,<sup>27</sup> an unresolved ambiguity in Rule 15(a)(1) has real potential to impede the enforcement of valid claims in federal court.<sup>28</sup>

This article explores the ambiguity introduced by the 2009 amendment to Rule 15(a)(1). Part I provides a brief history of Rule 15(a), outlines the mechanics of the rule's operation before it was amended in December of 2009, and examines the procedural shortfalls that led to the 2009 amendment. Part II takes a closer look at the 2009 amendment to Rule 15(a) by parsing the ambiguous timing language,

24. See *infra* notes 116-17, 153-56 and accompanying text (describing the different interpretations of amended Rule 15(a)(1) reached in WRIGHT, MILLER, KANE & MARCUS ON FEDERAL PRACTICE AND PROCEDURE and in MOORE'S FEDERAL PRACTICE).

25. *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009). To survive a Rule 12(b)(6) motion to dismiss after *Iqbal* and *Twombly*, a complaint must contain "sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Id.* at 1949 (citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007)). This plausibility standard is much tighter than the Supreme Court's previous long-standing guidance that a claim should be dismissed under Rule 12(b)(6) only when it appeared beyond doubt that the pleader could prove no set of facts that would entitle him to relief. See *Conley v. Gibson*, 355 U.S. 41 (1957).

26. *Twombly*, 550 U.S. 544.

27. As of July 19, 2010, *Iqbal*, which was decided on May 18, 2009, had been cited 10,925 times in case law and an additional 444 times in law review articles. Also, as of July 19, 2010, *Twombly*, which was decided on May 21, 2007, had been cited 30,579 times in case law and an additional 1,081 times in law review articles.

28. If an amendment as a matter of course is not possible under Rule 15(a)(1), the plaintiff is required to seek leave of court to amend under Rule 15(a)(2). FED. R. CIV. P. 15(a)(2). Amendments under Rule 15(a)(2) are denied when the amendment is rendered futile because the amended complaint would be subject to immediate dismissal. See, e.g., *Coventry First, LLC v. McCarty*, 605 F.3d 865 (11th Cir. 2010); *Bryant v. Dupree*, 252 F.3d 1161 (11th Cir. 2001). The heightened pleading standard imposed by *Iqbal* and *Twombly* increases the likelihood that a trial court may deny leave to amend on the ground of futility. The practical impact of this will be to reduce the number of cases in which plaintiffs reach the discovery phase and are allowed to fully develop evidence to support their claims.

14 *NORTH CAROLINA CENTRAL LAW REVIEW* [Vol. 33:10]

analyzing its three possible interpretations, and demonstrating the reality of the confusion by examining conflicting discussions of the amended rule in judicial decisions and treatises. Finally, Part III concludes that the best outcome is achieved by reading Rule 15(a)(1) to provide an uninterrupted period for as of course amendments that begins with the service of the complaint and ends twenty-one days after the service of the earlier of either the answer or Rule 12(b), (e), or (f) motion.

## I. THE DEVELOPMENT OF RULE 15(A) BEFORE 2009

Before December 1, 2009, Rule 15(a) used the following language to provide for pre-trial amendments to pleadings:

**(a) Amendments Before Trial.**

**(1) Amending as a Matter of Course.** A party may amend its pleading once as a matter of course:

- (A) before being served with a responsive pleading; or
- (B) within 20 days after serving the pleading if a responsive pleading is not allowed and the action is not yet on the trial calendar.

**(2) Other Amendments.** In all other cases, a party may amend its pleading only with the opposing party's written consent or the court's leave. The court should freely give leave when justice so requires.<sup>29</sup>

The significance of the phrase "as a matter of course" becomes clear when Rule 15(a)(1) is read in opposition to Rule 15(a)(2).<sup>30</sup> Rule 15(a)(1) provides parties with one, time-limited, chance to amend any pleading without seeking permission from the judge or from opposing parties.<sup>31</sup> Generally speaking, amendments under Rule 15(a)(1) are allowed as of right, meaning that the court does not have discretion to deny a timely amendment made under this rule.<sup>32</sup>

Amendments as a matter of course allow parties to correct mistakes and cure omissions quickly without wasting judicial resources on a hearing. These amendments also increase the odds that issues will be joined on the merits and that cases will not be dismissed based on technical or easily curable errors. Lastly, amendments as a matter of course help ensure that blameless litigants will not be penalized by mistakes made by their attorneys. Because amendments as a matter of course serve these important functions, they have been a part of

29. FED. R. CIV. P. 15(a) (2009) (amended 2009) (omitting Rule 15(a)(3) which then, as now, provides the time for responding to an amended pleading).

30. *Id.*

31. FED. R. CIV. P. 15(a)(1) (2009) (amended 2009).

32. *See, e.g.*, *Galustian v. Peter*, 591 F.3d 724 (4th Cir. 2010); *Caine v. Hardy*, 905 F.2d 858 (5th Cir. 1990); *Williams v. Bd. of Regents of Univ. Sys. of Ga.*, 477 F.3d 1282 (11th Cir. 2007).

federal practice since the adoption of the Federal Rules of Civil Procedure.<sup>33</sup>

#### 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.<sup>34</sup> 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.”<sup>35</sup> With the advent of written pleadings, formalism increased and amending became simultaneously more difficult,<sup>36</sup> 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.”<sup>37</sup> 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.<sup>38</sup>

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.<sup>39</sup> Twenty separate Statutes of Jeofails were enacted in England between 1340 and 1852 to address particularized needs for amendment.<sup>40</sup> 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.”<sup>41</sup>

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,<sup>42</sup> was transplanted to the United States and to other countries colonized by the British.<sup>43</sup> 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.<sup>44</sup> 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”<sup>45</sup> with one merged and simplified set of procedural rules.<sup>46</sup> 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.<sup>47</sup>

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.<sup>48</sup> 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.<sup>49</sup>

Judge Clark describes statutes to this effect in twenty-eight different states and territories.<sup>50</sup> 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.<sup>51</sup>

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,<sup>52</sup> but applied a uniform set of federal procedural rules in equity cases.<sup>53</sup> 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."<sup>54</sup> 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 . . . ."<sup>55</sup>

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.<sup>56</sup> Federal Rule 8 implemented a flexible system of notice pleading that, when coupled with the expanded dis-

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.<sup>57</sup>

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.<sup>58</sup> As a result, the reduced role of pleading under the Federal Rules paradoxically increased the importance of amendments to pleadings.<sup>59</sup> 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.<sup>60</sup> 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.”<sup>61</sup> 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.”<sup>62</sup> 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.<sup>63</sup> 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.”<sup>64</sup>

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.”<sup>65</sup> 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.’<sup>66</sup>

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.<sup>67</sup>

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<sup>68</sup> 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.<sup>69</sup>

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. *Id.*

67. *Id.* 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.<sup>70</sup> By definition, this is the universe of pleadings that state claims for relief – including the complaint, counterclaims, cross-claims, and third-party complaints.<sup>71</sup> The rule allowed these pleadings to be amended once as a matter of course until the pleader was served with a responsive pleading.<sup>72</sup> 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.<sup>73</sup> 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).<sup>74</sup>

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.<sup>75</sup> 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.<sup>76</sup> 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.<sup>77</sup>

---

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](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,<sup>78</sup> whose existence is justified on the grounds of judicial economy and the unlikelihood of prejudice to opposing parties.<sup>79</sup> 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.<sup>80</sup> 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.<sup>81</sup>

### 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<sup>82</sup> and are the product of a deliberative process that is comprehensively documented in the Advisory Committee's Minutes and Reports.<sup>83</sup> 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 28 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 States 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,<sup>84</sup> 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.”<sup>85</sup> Both sets of concerns indicate that dissatisfaction with the existing rule was focused on its use by the plaintiffs’ bar.<sup>86</sup>

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.”<sup>87</sup> 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.”<sup>88</sup> 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.<sup>89</sup>

---

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., *Breuer 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 85, 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.<sup>90</sup> This "free rider" effect<sup>91</sup> 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.<sup>92</sup>

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.<sup>93</sup>

Finally, former Rule 15(a)(1) was seen as a source of gratuitous delay and potential prejudice during the pretrial phase of litigation.<sup>94</sup> 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.<sup>95</sup> 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 85, 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.<sup>96</sup> 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.<sup>97</sup>

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,<sup>98</sup> sometimes long after the original complaint,<sup>99</sup> and sometimes after the original complaint had been dismissed.<sup>100</sup> 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 ambi-

---

pare more thoughtful, better researched initial complaints – a benefit to judges and defendants alike”).

96. *Id.* at 9 (noting that “[t]he amended rule will require the plaintiff to ‘fish or cut bait’ about amending the complaint within twenty-one days after service of the motion to dismiss, rather than waiting”).

97. The rule did allow the defendant to cut off the plaintiff's right to amend merely by filing an answer; however, the defendant's attorney sacrificed certain strategic advantages by filing an answer in lieu of a pre-answer motion to dismiss. For example, a pending pre-answer motion to dismiss tolls the defendant's obligation to answer the complaint. *See* FED. R. CIV. P. 12(a)(4). This gives the defendant more time to investigate and plan an intelligent response to the complaint. If successful, a pre-answer motion to dismiss also benefits the defendant by ending the litigation without the expense of taking the litigation any further. Because of these advantages, “a motion to dismiss is most often filed before an answer.” *Report of the Civil Rules Advisory Committee, supra* note 84, at 9.

98. *See, e.g.,* Willis v. Collins, 989 F.2d 187 (5th Cir. 1993) (prisoner's response to motion to dismiss construed as amended complaint); Taj Mahal Enters., Ltd. v. Trump, 745 F. Supp. 240 (D.N.J. 1990) (plaintiff amended complaint in response to motion to strike and dismiss); Murray v. West Palm Beach Hous. Auth., No. 08-80396-CIV, 2008 WL 4927007 (S.D. Fla. Nov. 17, 2008) (response to motion to dismiss construed as amended complaint).

99. Although the gap between the original and amended complaints would typically last for several months, it is possible to find cases in which the gap stretches for much longer. *See, e.g.,* Vitullo v. Mancini, 684 F. Supp. 2d 747 (E.D. Va. 2010) (four months); Milliner v. DiGuglielmo, No. 08-4905, 2010 WL 972151 (E.D. Pa. Mar. 16, 2010) (nine months); Sahu v. Union Carbide Corp., No. 04 Civ. 8825(JFK), 2010 WL 2473585 (S.D.N.Y. June 16, 2010) (case pending 5 ½ years). In *Sahu*, the defendant had filed a motion to dismiss, but no responsive pleading. Five and one-half years after filing the original complaint, the plaintiff asked the court for a ruling that the 2009 version of Rule 15(a) would apply to any amended complaint. Because the plaintiff had not yet filed an amended complaint, the court denied plaintiff's motion on the ground that it sought an advisory opinion. *Sahu*, 2010 WL 2473585.

100. *See, e.g.,* Stein v. Royal Bank of Canada, 239 F.3d 389 (1st Cir. 2001) (plaintiff free to amend complaint until entry of judgment on order of dismissal); Camp v. Gregory, 67 F.3d 1286 (7th Cir. 1995); Rick-Mik Enters. v. Equilon Enters., 532 F.3d 963 (9th Cir. 2008); Mayes v. Leipziger, 729 F.2d 605 (9th Cir. 1984); *but see* Acevedo-Villabos v. Hernandez, 22 F.3d 384 (1st Cir. 1994); Smith v. NCAA, 139 F.3d 180 (3d Cir. 1998).



guity 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.

## II. THE AMBIGUOUS 2009 AMENDMENT TO RULE 15(A)(1)

As amended on December 1, 2009, Rule 15(a) uses the following language to provide for pre-trial amendments to pleadings:

### (a) Amendments Before Trial.

**(1) Amending as a Matter of Course.** A party may amend its pleading once as a matter of course within:

(A) 21 days after serving it, or

(B) if the pleading is one to which a responsive pleading is required, 21 days after service of a responsive pleading or 21 days after service of a motion under Rule 12(b), (e), or (f), whichever is earlier.

**(2) Other Amendments.** In all other cases, a party may amend its pleading only with the opposing party's written consent or the court's leave. The court should freely give leave when justice so requires.<sup>101</sup>

The amendment made no changes to Rule 15(a)(2), but it revised Rule 15(a)(1) in ways that have both intended and unexpected consequences.

The Advisory Committee Note explains that the 2009 amendment was intended to make "three changes in the time allowed to make one amendment as a matter of course."<sup>102</sup> First, the Committee intended to eliminate the distinction between responsive pleadings and Rule 12 motions, with the result that the right to amend once as a matter of course now ends twenty-one days after service of the earliest motion under Rule 12(b), (e), or (f).<sup>103</sup> Second, the right to amend once as a matter of course no longer ends when a responsive pleading is filed; instead, the pleader is given twenty-one days after the service of a responsive pleading to amend as a matter of course.<sup>104</sup> The Committee Note wards off a potential ambiguity here by clarifying that these two time periods are "not cumulative," indicating that the right to amend as a matter of course will end twenty-one days after service of the earlier of a responsive pleading or any motion made under Rule 12(b), (e), or (f).<sup>105</sup> Finally, the third intended change "extends from

101. FED. R. CIV. P. 15(a).

102. Fed. R. Civ. P. 15 advisory committee's note.

103. *Id.*

104. *Id.*

105. *Id.*

20 to 21 days the period to amend a pleading to which no responsive pleading is allowed.”<sup>106</sup>

The Advisory Committee Minutes and Reports provide a context for each of the three intended changes discussed in the Advisory Committee Note.<sup>107</sup> The third change, which is directed only at pleadings – like the answer – that require no responsive pleading, was part of a much larger package of amendments to time-computation rules primarily expanding times formerly set at ten or twenty days to fourteen or twenty-one days.<sup>108</sup> This change is conceptually detached from the remaining changes to Rule 15(a)(1), and appeared in the 2009 amendment as part of the completion of Advisory Committee’s Rules-wide time computation project.<sup>109</sup>

The Advisory Committee materials relating to the first and second of the intended changes make it clear that they have an entirely different purpose from the third change and are directed at controlling amendments as of course to complaints and other pleadings that state claims for relief.<sup>110</sup> Although the amendment’s focus on amendments by plaintiffs and other claimants is not expressly stated in the 2009 Advisory Committee Note, it is implicit in the structure of the changes since responsive pleadings and Rule 12 motions are normally directed only at pleadings that state a claim for relief. The Advisory Committee Note is equally silent with respect to any concern about past misuse of Rule 15(a)(1) by the plaintiff’s bar, although glimmers of frustration can be gleaned from the Advisory Committee’s statements that the 2009 amendment “will force the pleader to consider carefully and promptly the wisdom of amending,” “expedite determination of issues that otherwise might be raised *seriatim*,” and “advance other pretrial proceedings.”<sup>111</sup>

Unfortunately, the drafters failed to produce an amended rule that clearly reflects these underlying concerns resulting in an ambiguous text. The first source of confusion is the amended rule’s failure to clearly define which subsections of Rule 15(a)(1) apply to pleadings

---

106. *Id.* The Advisory Committee Note also points out that this portion of the amendment deletes prior language that cut off the right to amend as a matter of course when the action was placed on a trial calendar. *Id.* This deletion recognizes that the function of the trial calendar has largely been supplanted by the use of pretrial scheduling orders in modern practice. *Id.*

107. *See supra* Part I. C.

108. *See supra* Part I. C. *See, e.g.*, the 2009 amendments to FED. R. CIV. P. 6; FED. R. CIV. P. 12; FED. R. CIV. P. 14; FED. R. CIV. P. 23; FED. R. CIV. P. 27; FED. R. CIV. P. 32; FED. R. CIV. P. 38; FED. R. CIV. P. 50 (expanding 10-day period to 28 days); FED. R. CIV. P. 52 (same); FED. R. CIV. P. 53; FED. R. CIV. P. 54; FED. R. CIV. P. 55; FED. R. CIV. P. 56.

109. *See, e.g., Minutes: Civil Rules Advisory Committee, May 22-23, 2006, supra* note 86, at 20-23.

110. *See supra* Part I. C.

111. FED. R. CIV. P. 15 advisory committee’s note.

that state a claim.<sup>112</sup> Because the introductory clause of the amended rule begins with general references to any “party” and any “pleading,”<sup>113</sup> the literal language of the new rule allows a plaintiff to use either subsection (A) or (B) to support an amendment as a matter of course. Although Rule 15(a)(1)(B) limits its application to pleadings “to which a responsive pleading is required,”<sup>114</sup> thereby denying defendants the ability to use this rule to amend the answer, Rule 15(a)(1)(A) contains no language similarly excluding plaintiffs.<sup>115</sup> As a result, the plain language of the amended rule allows a plaintiff to amend his complaint once as a matter of course within twenty-one days after “serving it,”<sup>116</sup> or within twenty-one days after service of the earlier of a motion under Rule 12(b), (e), or (f).<sup>117</sup>

The words used in the amended rule also create a major structural change from the pre-amendment version of Rule 15(a)(1), which unquestionably referred plaintiffs to former Rule 15(a)(1)(A) for guidelines on amendments as a matter of course, and equally clearly excluded plaintiffs from subsection (B).<sup>118</sup> Although nothing in the Advisory Committee Minutes, Reports, or Note explains – or even addresses – this structural change, the new language is so clear that many courts are following it without comment despite its sometimes anomalous effects.<sup>119</sup> On the other hand, perhaps because this organizational change is not discussed in the Advisory Committee Note and runs counter to the straightforward procedure of the old rule, it is being ignored by an equivalent camp of judges who read only Rule 15(a)(1)(B) as applying to the complaint.<sup>120</sup>

The problem is compounded by the amended rule’s failure to clearly identify the point at which the plaintiff’s Rule 15(a)(1) right to amend *begins*. Although the text of the rule appears to limit the amendment period to twenty-one days, it is unclear whether the plaintiff has *one* twenty-one day period that begins with the defendant’s service of a responsive pleading or Rule 12 motion,<sup>121</sup> *two* twenty-one day periods – one beginning with the plaintiff’s service of the com-

112. See *infra* Part II. A.

113. FED. R. CIV. P. 15(a)(1) (“A party may amend its pleading once as a matter of course. . .”).

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

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

116. *Id.*

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

118. FED. R. CIV. P. 15(a)(1) (2009) (amended 2009).

119. See *infra* Part II. A. These courts are joined by a major treatise on federal civil procedure, WRIGHT, MILLER, KANE, & MARCUS, *FEDERAL PRACTICE AND PROCEDURE*. See *infra* notes 129-30 and accompanying text.

120. See *infra* Part II. B. This group of courts is joined by MOORE’S *FEDERAL PRACTICE*, a second major treatise on federal civil procedure. See *infra* notes 153-56 and accompanying text.

121. This interpretation results if only Rule 15(a)(1)(B) is read to apply to the complaint.

plaint and a second that begins with the defendant's service of a responsive pleading or Rule 12 motion,<sup>122</sup> or one *continuous* period that begins with the service of the complaint and ends twenty-one days after the defendant's service of a responsive pleading or Rule 12 motion.<sup>123</sup>

As a result of these ambiguities, three readings of amended rule 15(a)(1)(A) are possible. A survey of the developing case law confirms that judges actually are applying the amended rule in different ways, although they are doing so without noting any ambiguity and without remarking upon the fact that different lines of cases are emerging. Eight months after the adoption of the amended rule,<sup>124</sup> most courts have chosen either the first or second interpretation, with cases almost equally split between the two.<sup>125</sup> Despite this, the third possible interpretation best addresses the Advisory Committee's concerns and offers the most sensible procedural solution.

#### A. *The First Interpretation: A Completely Literal Reading of the Amended Rule*

The most literal reading of amended Rule 15(a)(1) allows the plaintiff to use either subsection (A) *or* (B) to amend the complaint once as a matter of course. This interpretation views Rule 15(a)(1) as setting up two possible periods for amending the complaint as a matter of course. First, the plaintiff has the right to file an amended complaint within "21 days after serving [the original complaint]."<sup>126</sup> Second, the plaintiff has the right to file an amended complaint for an additional twenty-one day period that begins with "service of a responsive pleading or 21 days after service of a motion under Rule 12(b), (e), or (f), whichever is earlier."<sup>127</sup>

This reading is found in approximately half of the reported decisions dealing with the amended rule,<sup>128</sup> as well as in *Wright & Miller on Federal Practice and Procedure*,<sup>129</sup> one of the most respected treatises

122. This is possible if Rule 15(a)(1)(A) is read to apply to the complaint. As explained in parts II.A. and C., the next question is whether to follow the literal language of the rule and let this twenty-one day period expire to be followed by a second twenty-one day window for amendment that begins with the defendant's service of a responsive pleading or Rule 12 motion.

123. See discussion *infra* Part II. C.

124. The case law discussed in part II was surveyed in July of 2010.

125. See *infra* notes Part II. A-B.

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

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

128. See *infra* notes 132-34 and accompanying text.

129. 6 CHARLES ALAN WRIGHT, ARTHUR R. MILLER, MARY KAY KANE, & RICHARD L. MARCUS, *FEDERAL PRACTICE AND PROCEDURE* §§ 1480-83 (3d ed. 2010). But see 3 MOORE ET AL., *supra* note 3, § 15.12[3] (3d ed. 2010), discussed *infra* at notes 153-56 and accompanying text (adopting a second interpretation of amended Rule 15(a)(1)).

tises on federal civil procedure. *Wright & Miller* presently offers the following interpretation of the 2009 amendment.

The right to amend is no longer terminated by the service of a responsive pleading. Instead, Rule 15(a)(1)(A) extends the right to amend as a matter of course to within 21 days after serving a pleading or within one of the periods in Rule 15(a)(1)(B), whichever is earlier.<sup>130</sup>

Decisions that follow this interpretation can be spotted because they also allow the plaintiff to use either Rule 15(a)(1)(A) or (B) to amend the complaint.<sup>131</sup> In some of these decisions, the facts do not compel the judge to apply Rule 15(a)(1)(A), and the judge simply quotes amended Rule 15(a)(1) in a way that includes both subsections (A) and (B) when referring to amendments to complaints.<sup>132</sup> However, in other decisions, the court explicitly recognizes that the plaintiff has the “right to one amendment as of right under Rule 15(a)(1)(A).”<sup>133</sup>

The most interesting of these decisions read Rule 15(a)(1) as allowing two discrete twenty-one day periods for amending the complaint as of right, and then go a step further and recognize that this construction of the amended rule may result in a gap between the two periods during which amendment as of right will not be possible.<sup>134</sup> This unexplained lapse in the plaintiff’s right to amend serves no apparent purpose and is not supported by any discussion in the Advisory Committee’s background documents. In the context of such a well-documented amendment, the simple fact of the Advisory Committee’s silence leads to the implication that the Committee did not intend for the amendment to have this effect.

---

130. 6 WRIGHT ET AL., *supra* note 129, § 1483.

131. See *infra* notes 132-33 and accompanying text.

132. *Ramos v. Aurora Loan Servs.*, No. 09-61938-CIV, 2010 WL 966856 (S.D. Fla. Mar. 15, 2010); *Salazar v. Lehman Bros. Bank*, No. CV-10-99-PHX-DGC, 2010 WL 1996374 (D. Ariz. May 14, 2010); *Coit v. Sutton Funding LLC*, No. CV-10-0436-PHX-DCG, 2010 WL 2105116 (D. Ariz. May 24, 2010); *Branch Banking & Trust Co. v. Syntellect, Inc.*, No. 2:08cv955-MHT, 2010 WL 2403072 (M.D. Ala. June 14, 2010); *Alvarez v. Cnty. of Maricopa*, No. CV-10-310-PHX-DGC, 2010 WL 2594315 (D. Ariz. June 23, 2010); *Pohl v. E.P.A.*, No. 09-1480, 2010 WL 2607476 (W.D. Pa. June 25, 2010).

133. *Prakash v. Atladis U.S.A., Inc.*, No. 5:10CV33, 2010 WL 2653419 at \*2 (N.D. Ohio July 2, 2010). *Accord* *Braninburg v. Coalinga State Hosp.*, No. CV 1-08-1457-MHM, 2010 WL 711888 (E.D. Cal. Feb. 25, 2010); *Nattah v. Bush*, 605 F.3d 1052, 1056 n.2 (D.C. Cir. 2010); *Ferris Plaza, Ltd. v. Peerless Indem. Ins. Co.*, No. 3:10-CV-633-L, 2010 WL 2540826 at \*2, n.1 (N.D. Tex. June 22, 2010) (“Even if Rule 15(a)(1) were to apply, Plaintiff did not amend within twenty-one days of service, twenty-one days of Defendants’ answer in state court, or twenty-one days of removal.”).

134. *Fontenot v. Thiele (In re Thiele)*, AP No. 09-5080, 2010 WL 1026972 at \*9 (Bankr. E.D. Tenn. Mar. 17, 2010) (“As provided in Rule 15(a)(1), the Fontenots had 21 days after they filed their complaint and another 21 days after Thiele filed his motion to dismiss under Rule 12(b)(6) in which to file an amended complaint as a matter of course.”); *Scianna v. Amegy Bank Nat’l Assoc. (In re Bigler, LP)*, AP No. 10-03029, 2010 WL 1993807 (Bankr. S.D. Tex. May 18, 2010); *Gagliardi v. Duran*, No. 09-cv-00426-WYD-BNB, 2010 WL 2543555 (D. Colo. May 25, 2010).

This implication draws strength from the existence of another line of decisions interpreting amended Rule 15(a)(1) differently.<sup>135</sup> It is further bolstered by the fact that at least one leading treatise on federal procedure also reads amended Rule 15(a)(1) very differently.<sup>136</sup> However, the implication becomes an irrefutable conclusion upon close examination of the May 6, 2008 Advisory Committee Report, which reveals that this interpretation of the amended rule was raised in a public comment on the proposed rule, considered, and specifically rejected by the Advisory Committee as misguided.<sup>137</sup>

Public Comment Number 07-CV-020 submitted by the Jordan Center for Criminal Justice and Penal Reform reads the proposed amendment to Rule 15(a)(1) as creating:

[A] gap from 21 days following service to the filing of a responsive pleading (if permitted) or a Rule 12 motion to dismiss in which an amended pleading may *not* be filed as a matter of course . . . . Under the current Rule, the party may simply file an amended pleading. Under the proposed rule, however, the party must either seek leave to amend pursuant to Rule 15(a)(2) or take the simpler course that is more burdensome to the respondent of awaiting the responsive pleading or motion to dismiss and then filing the amended pleading to which respondent must respond or move to dismiss anew.<sup>138</sup>

The Jordan Center's comment, which clearly points out that the amended Rule 15(a)(1) can be read to create a gap between two discrete amendment periods, drew a written response from the Advisory Committee.<sup>139</sup>

135. See *infra* notes 151-52 and accompanying text.

136. See *infra* notes 153-55 and accompanying text (discussing the analysis of amended Rule 15(a)(1) in MOORE'S FEDERAL PRACTICE).

137. COMMITTEE ON RULES OF PRACTICE AND PROCEDURE, *Report of the Civil Rules Advisory Committee*, U.S. COURTS, (May 6, 2008) <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/CV06-2008.pdf> [hereinafter *May Report*].

138. FED. R. CIV. P. 15 cmt. 07-CV-020 Jordan Center for Criminal Justice and Penal Reform, <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/CV%20Comments%202007/07-CV-020.pdf>. Mark Jordan is a federal prisoner who contends that he is wrongfully incarcerated. See *About Mark Jordan*, JORDANLITIGATION.COM, <http://www.jordanlitigation.com/about-mark-jordan.php> (last visited Oct. 22, 2010). It is possible that Jordan's status as a federal prisoner caused the Advisory Committee to discount the seriousness of his comment; however, it is noteworthy that thirteen judicial decisions have reached the same conclusion as Jordan.

139. Under the federal rulemaking process, Advisory Committees publish proposed rule amendments and Advisory Committee notes and solicit comments from the public. Cf. 28 U.S.C. § 2073(c)(1) (1994). ("Each meeting for the transaction of business under this chapter by any committee appointed under this section shall be open to the public . . ."). "All interested individuals and organizations are provided an opportunity to comment on proposed rules amendments and to recommend alternative proposals. The comments received from this extensive and thorough public examination are studied very carefully by the committees and generally improve the amendments. The committees actively encourage the submission of comments, both positive and negative, to ensure that proposed amendments have been considered by a broad segment of the bench and bar." James C. Duff, *A Summary for the Bench and Bar, The Federal Rules of Practice and Procedure*, Administrative Office of the U.S. Courts, U.S. COURTS, (Oct. 2010),

The Advisory Committee's response is published in the May 6, 2008 Committee Report, which contains the final texts of the amended rule and proposed Committee Note, a summary of all public comments received on the proposed amendment, and the Committee's response to all substantive comments.<sup>140</sup> In addressing the Jordan Center's comment, the Committee Report notes that the comment reads the proposed amendment to Rule 15(a)(1) as having the potential to create a gap between two separate amendment periods.<sup>141</sup> The Advisory Committee dismissed this understanding of the amendment as:

*[M]isinterpreting what is intended: the comment reads the proposal to create a gap that suspends and then revives the right to amend once as a matter of course – the right persists for 21 days after service of the pleading, disappears, and then reappears for 21 days after service of a responsive pleading or Rule 12 motion. The question raised by this suggestion is whether (a)(1)(A) should be revised “(A) if the pleading is one to which a responsive pleading is not required, 21 days after serving it, (B) if the pleading is one to which a responsive pleading is required, 21 days after service of a responsive pleading or 21 days after service of a motion . . . .”*<sup>142</sup>

The Jordan Center's comment placed the Committee on notice that the language of the proposed amendment could be read to create an anomalous period during which the plaintiff would have no right to amend the complaint as a matter of course.<sup>143</sup>

After dismissing this reading of the amendment as a misunderstanding, the Advisory Committee gave it short shrift in the summary response to all of the substantive comments received on the proposed rule amendment:

*Discussion:* That Rule 15(a) be recommended for adoption as published. No changes need be made in the Committee Note. The Subcommittee and Committee considered many variations on the right to amend once as a matter of course and *the events that cut it off*. The argument that at least a responsive pleading should immediately terminate the right to amend was advanced vigorously in Standing Committee discussion. No new reasons have been suggested for reconsidering the recommendation. *The suggestion made by the Jordan Center is a matter of style; the rule as published seems clear.*<sup>144</sup>

This discussion makes it plain that the Advisory Committee's focus was on the events that would terminate the plaintiff's right to amend

---

<http://www.uscourts.gov/RulesAndPolicies/FederalRulemaking/RulemakingProcess/SummaryBenchBar.aspx>.

140. *May Report*, *supra* note 137, at 55-56.

141. *See May Report*, *supra* note 137, at 56.

142. *May Report*, *supra* note 137, at 56.

143. *See id.*

144. *See id.* (emphasis added).

as of course. The Jordan Center's comment, which refocused the lens to ask which events would *begin* the plaintiff's right to amend as a matter of course, was dismissed as mistaken and not reflective of the Committee's intent.

Despite the Advisory Committee's characterization of Jordan Center's comment as misguided, thirteen judicial opinions entered between December 1, 2009 and July 31, 2010 have applied the literal language of the amended rule and misread the meaning of the amended rule in the same way.<sup>145</sup> These decisions apply the plain language of amended Rule 15(a)(1) and recognize that a completely literal reading of the amended rule allows the plaintiff to use either subsection (A) *or* (B) to amend the complaint as a matter of course.<sup>146</sup> Although these decisions are reading the literal language of the amended rule correctly, the Advisory Committee's May 6, 2008 Report establishes that this interpretation was not intended by the Advisory Committee.

#### B. *The Second Interpretation: A Quasi-Literal Interpretation of the Amended Rule*

The second possible interpretation of amended Rule 15(a)(1) finds that only subsection (B) – and not subsection (A) – applies to pleadings, like the complaint, that require a responsive pleading. These decisions effectively highlight the positive phrase “if the pleading is one to which a responsive pleading is required”<sup>147</sup> in subsection (B), and draw the negative implication that these pleadings are excluded from the operation of subsection (A). This reading of the rule “permits parties to amend ‘as a matter of course’ a pleading to which a responsive pleading is required within twenty-one days after service of a responsive pleading or the filing of a motion under Rule 12(b), (e), or (f).”<sup>148</sup>

By July 24, 2010, thirteen judicial decisions had adopted this approach to amended Rule 15(a)(1).<sup>149</sup> These decisions can be identified because they assume that only Rule 15(a)(1)(B) can be used to amend the complaint as a matter of course, and that this rule creates a twenty-one day period for amendment.<sup>150</sup> Some of these decisions apply subsection (B) without discussion or in a way that is forced by the

---

145. See *supra* notes 127-29 and accompanying text.

146. *Id.*

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

148. *DeWald v. Clinton*, No. 05-71492, 2010 WL 778057, at \*1 (E.D. Mich. Mar. 4, 2010).

149. By the same date, another 13 decisions had reached a completely different understanding of amended Rule 15(a)(1). See *supra* Part II. A.

150. See *infra* notes 151-52.



procedural posture of the case.<sup>151</sup> However, another subset of these decisions very clearly holds that the plaintiff is allowed “to amend his Complaint once as a matter of right, as long as he [does] so within 21 days of service of Defendants’ Answer or a motion under Rule 12(b), (e) or (f).”<sup>152</sup>

The plausibility of this approach to amended Rule 15(a)(1) is demonstrated by its adoption in *Moore’s Federal Practice*,<sup>153</sup> as well as, by several of the public comments on the proposed amendment, which assume this meaning for the new rule. *Moore’s* explains that “there is, in fact, only one, single 21-day period available for amending [complaints] ‘as a matter of course.’”<sup>154</sup> The earliest served responsive pleading or motion starts that single period running.”<sup>155</sup> This reading of the rule echoes several public comments, typified by the comment submitted by the Department of Justice, noting that “under this proposal, a pleading to which a responsive pleading is required (such as a complaint or a cross- or counter-claim) can be amended once as a matter of course 21 days *after* service of a responsive pleading, or 21 days *after* service of a motion under Rule 12(b), (e), or (f), whichever is earlier.”<sup>156</sup>

151. *Hamilton v. Bogardus (In re Crawford)*, AP No. 09-7084, 2010 WL 908482 (Bankr. D. Kan. Mar. 10, 2010); *Martinez v. America’s Wholesale Lender*, No. C 09-05630 WHA, 2010 WL 934617 (N.D. Cal. Mar. 15, 2010); *Ponton v. U.S. Dist. Ct. for the E.D. of Pa.*, No. 10-1514 (JBS), 2010 WL 2010885 (E.D. Pa. May 17, 2010); *Midthassel v. Aramark Corp.*, No. 09-05515 (FLW), 2010 WL 2521977 (D.N.J. June 15, 2010).

152. *Jackson v. Municipality of Selma*, No. 10-00168-B, 2010 WL 2104591 at \*1 (S.D. Ala. May 3, 2010); *accord Dewald*, 2010 WL 778057; *Wright v. Saxon Mortg. Servs., Inc.*, No. C 09-05960 WHA, 2010 WL 1032634 (N.D. Cal. Mar. 19, 2010); *Mills v. Caruso*, No. 1:09-cv-249, 2010 WL 1254576 (W.D. Mich. Mar. 26, 2010); *Knox v. Rhodes*, No. 08-cv-277-IPG, 2010 WL 1444875 (S.D. Ill. Apr. 9, 2010); *Rezentes v. Sears, Roebuck & Co.*, No. 10-00054 SOM/KSC, 2010 WL 1905011 (D. Haw. May 10, 2010); *Foresight Prods., LLC v. Bond Mfg. Co.*, No. 09-cv-02629-CMA-BNB, 2010 WL 1904522 (D. Colo. May 11, 2010); *Pierce v. Lowe’s Home Ctrs., Inc.*, No. 10-507, 2010 WL 2080030 (W.D. Pa. May 24, 2010); *Martinelli v. Morrow*, No. 3:09cv256/MCR/MD, 2010 WL 2278152 (N.D. Fla. June 3, 2010).

153. 3 MOORE ET AL., *supra* note 3, § 15.12[3].

154. *Id.*

155. *Id.* See also *id.* (citing Rule 15(a)(1)(B) to support the statement that “[a] party may amend its pleading, if it is ‘one to which a responsive pleading is required,’ either: within 21 days after service of a responsive pleading, or within 21 days after service of a motion under Rule 12(b), (e), or (f).”).

156. Letter from Jeffrey S. Bucholtz, Acting Assistant Attorney General, to Peter G. McCabe, Secretary of the Committee on Rules of Practice and Procedure (Feb. 15, 2008) (on file with author), available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/CV%20Comments%202007/07-CV-015.pdf> (emphasis added). The proposed rule was given a similar interpretation in comments submitted by attorney Robert M. Steptoe, Jr., and Professor Bradley Scott Shannon. See Letter from Robert M. Steptoe, Jr., to Peter G. McCabe, Secretary of the Committee on Rules of Practice and Procedure (Feb. 12, 2008) (on file with author), available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/CV%20Comments%202007/07-CV-011.pdf>; Email from Professor Bradley Scott Shannon to Secretary McCabe (Feb. 14, 2008) (on file with author), available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/CV%20Comments%202207/07-CV-012.pdf>.

This reading of the amended rule applies Rule 15(a)(1)(B) literally and ignores other aspects of the text that, taken equally literally, make subsection (A) also applicable to complaints and other pleadings that state claims.<sup>157</sup> This analysis of the rule enforces the two primary purposes of the amendment to Rule 15(a)(1) by limiting the plaintiff's time to amend and by giving equivalent treatment to responsive pleadings and Rule 12 motions.<sup>158</sup> It also reflects the intent of the Advisory Committee more accurately than the first, most literal, interpretation of the amended rule.

Despite these advantages, this interpretation has several drawbacks that will appear in actual practice. First, it limits the plaintiff's period for amendments as of course to a mere twenty-one days.<sup>159</sup> Second, and more importantly, it allows the defendant – and not the plaintiff – to control when this period will occur in the case.<sup>160</sup> This gives a small procedural advantage to the defendant that is not justified by any corresponding policy goal. Finally, because this interpretation delays the plaintiff's right to amend until the defendant's service of a responsive pleading or motion, this reading of the rule makes it impossible for the plaintiff to file an early and unprompted amendment as of course to correct obvious defects with the complaint.<sup>161</sup> This undermines the policy of efficiency that underlies amended Rule 15(a)(1) by forcing the plaintiff to defer an amendment that could be made earlier.

Of course, the plaintiff remains free to seek leave to amend and, practically speaking, it is unlikely that a court would deny leave to amend under Rule 15(a)(2) on a motion filed so early in the case.<sup>162</sup> Nevertheless, Rule 15(a)(2) motions, even when routine and easily resolved, still require some level of judicial time and attention. Amended pleadings filed as a matter of course under Rule 15(a)(1) do not require the judge's involvement, and thus promote judicial economy by simply allowing easy amendments without judicial supervision in very early stages of litigation.<sup>163</sup> As a result, it is both reasonable

---

157. See *supra* Part II.A.

158. See *supra* notes 91-94 and accompanying text.

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

160. This interpretation ties the beginning of the plaintiff's right to amend to the defendant's service of a responsive pleading or Rule 12 motion. By definition, this will occur at a time chosen by the defendant, who will typically obtain several extensions of time before otherwise appearing in the case. See *Id.*

161. For example, if the defendant defaults and simply does not appear, this interpretation of Rule 15(a) deprives the plaintiff of the ability to amend as a matter of course to correct technical problems with her complaint.

162. See *Report of the Civil Rules Advisory Committee, supra* note 84, at 10. ("[E]xperience seems to be that leave will be granted if there is any plausible prospect that a potentially sustainable claim or defense lies under an inept pleading.").

163. See *supra* notes 79-80.

and advantageous to allow amendments as a matter of course *before* the defendant's appearance in the case.

The second interpretation's inexplicable failure to allow this desirable result, standing alone, is irrational. When considered in combination with the other drawbacks of this reading of the rule, however, it becomes part of a larger pattern of awkward procedural effects. These intrinsic flaws make it unlikely that the second interpretation reflects the Advisory Committee's true intent.

C. *The Third Interpretation: A Continuous Period for Amending Complaints that Begins when the Complaint is Filed*

The weaknesses inherent in the first and second interpretations can be cured by reading amended Rule 15(a)(1) so that: (1) only Rule 15(a)(1)(B) applies to amendments to pleadings that require responsive pleadings, and (2) the twenty-one day periods referenced in subsection (B) are viewed as terminating, but not otherwise limiting, the right to amend as of course. This approach enforces the policies behind the amendment, protects judicial economy, and avoids pointless procedural gaps. Unfortunately, the literal language of the amended rule does not clearly produce this result, making it necessary to look for a less natural reading of the rule that better reflects the Advisory Committee's intentions.<sup>164</sup>

The first necessary point, finding Rule 15(a)(1)(A) inapplicable to pleadings that state claims, can be reached by focusing on the fact that subsection (B) applies only "if the pleading is one to which a responsive pleading is required."<sup>165</sup> Technically, this language excludes certain other pleadings from the operation of subsection (B); however, it is equally possible to draw the negative implication that it also has a limiting effect.<sup>166</sup> Read in this way, Rule 15(a)(1)(B) becomes the only part of the rule that applies to pleadings that state claims, and hence is the sole provision allowing amendments as a matter of course to such pleadings. Although not the most obvious reading of the rule, this interpretation is plausible and achieves a more desirable result than other alternatives.<sup>167</sup>

164. When, as here, the language of a Rule or statute is clearly ambiguous, the best construction will typically be one that reflects the drafter's intent. See, e.g., *Iraola & CIA, S.A. v. Kimberly-Clark Corp.*, 232 F.3d 854, 857 (11th Cir. 2000).

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

166. See *supra* notes 140-42.

167. This adjustment to the rule is necessary only to avoid the nonsensical gap that results if both (A) and (B) apply and an extension of the time to respond is allowed to the defendant. See *supra* note 129-30 and accompanying text. If no extension of time is obtained, the 21 day periods in (A) and (B) will dovetail perfectly and no gap will appear.

The second necessary point is to view the twenty-one day periods given in Rule 15(a)(1)(B) as terminating, but not otherwise limiting, the time for amendments as a matter of course. This allows the period for amendment to begin when the pleading is filed or served.<sup>168</sup> This result can be reached by tying the word “within” that precedes subsections (A) and (B) to the events stated in subsection (B) to create a set of termination dates.<sup>169</sup> In this way, Rule 15(a)(1)(B) can be read as establishing a termination date that will always be twenty-one days after the occurrence of a certain event, but not as limiting the period for amendment to a mere twenty-one days. This is exactly how the rule has historically operated; however, the Committee’s choice of the word “within,” which was added by the 2009 amendment, allows the rule to be read in a more limited way.<sup>170</sup>

This interpretation of the rule was assumed in *Montz v. Pilgrim Films & Television, Inc.*, one of the first circuit court decisions to discuss the 2009 amendment to Rule 15(a)(1).<sup>171</sup> In *Montz*, Judge O’Scannlain writes of the applicability of the amendment to a pending complaint:

Amendments to Rule 15(a) took effect on December 1, 2009, and apply to pending proceedings ‘insofar as just and practicable.’ Rule 15(a), as amended, provides that a party’s right to amend as a matter of course *terminates* ‘21 days after service of a responsive pleading or 21 days after service of a motion under Rule 12(b), (e), or (f), whichever is earlier.’ Thus, under the amended rule, the plaintiffs’ right to amend as a matter of course *terminated* in May 2007, before the district court’s ruling on the defendants’ Rule 12(b)(6) motion.<sup>172</sup>

The judge’s addition of the word “terminates” immediately before the quotation from the rule indicates that he does not read the rule as limiting the plaintiff to one twenty-one day period in every case.<sup>173</sup> Instead, he reads the amended rule as creating a period that ends on the specified date.<sup>174</sup> This usage implies a continuous time-period that ends twenty-one days after one of the events specified in Rule 15(a)(1)(B), but begins at some earlier point.

---

168. Before the 2009 amendment, Rule 15(a) did not distinguish between these two events, allowing an amendment as a matter of course “at any time” before a responsive pleading was served. FED. R. CIV. P. 15(a) (2009) (amended 2009). Thus, it was possible to amend a complaint once as a matter of course immediately after filing it.

169. These events are, of course, the service of the earlier of a responsive pleading or a motion under Rule 12(b), (e), or (f).

170. As noted previously, a number of courts, as well as one major treatise, are reading the rule in exactly this way. See *supra* Part II.B.

171. *Montz v. Pilgrim Films & Television, Inc.*, 606 F.3d 1153 (9th Cir. 2010).

172. *Id.* at 1159 n.1 (emphasis added) (internal citations omitted).

173. *Id.*

174. *Id.*

The background material to the 2009 amendment makes it clear that the Advisory Committee was also focused on the cutoff point for amendments as of right to pleadings that state a claim.<sup>175</sup> Nothing in these materials indicates any intention to change the point at which the right begins. To the contrary, the Committee's gaze was on two goals located at the termination point. The first goal allows responsive pleadings and Rule 12 motions to have equal weight in terminating the plaintiff's right.<sup>176</sup> The second goal tightens the time for amendments to a relatively brief period after the defendant's appearance through a responsive pleading or Rule 12 motion.<sup>177</sup> These goals are completely fulfilled by allowing amended Rule 15(a)(1)(B) to control the *termination* of the plaintiff's right to amend, and nothing is gained by reading subsection (B) as also controlling the start date and limiting the period to a scant twenty-one days. Similarly, nothing in the Advisory Committee materials indicates any intention to create the possible gap created by the first interpretation of the amended rule. In fact, the Committee itself has characterized this reading as a misunderstanding of the amendment.<sup>178</sup>

Given this, the Committee's intention appears to have been to use amended Rule 15(a)(1)(B) to create a continuous period for amendments as of right to pleadings that state a claim. This period would, as before, begin with the filing of the pleading, but would now predictably terminate twenty-one days after the service of a responsive pleading or motion under Rule 12(b), (e), or (f). Unfortunately, the amended text does not lead to this outcome, with the result that the initial discussions of amended Rule 15(a)(1) in treatises and case law fragment into two camps – neither of which corresponds to the most logical construction of the rule.<sup>179</sup>

### III. CONCLUSION: THE THIRD INTERPRETATION PROVIDES THE BEST OUTCOME

Because amended Rule 15(a)(1) is inherently ambiguous, three interpretations of amended Rule 15(a)(1) are possible and courts will be forced to select between them. This choice should be made thoughtfully because the Federal Rules of Civil Procedure give amendments a central role that is closely tied to the function of pleading itself. As pleading itself becomes more difficult, the ability of parties to easily

---

175. *See supra* Part I. C.

176. *See supra* notes 87-93 and accompanying text.

177. *See supra* notes 94-97 and accompanying text.

178. *See supra* notes 140-44 and accompanying text.

179. *See supra* Parts II. A.-B.

amend their pleadings becomes correspondingly more important.<sup>180</sup> Despite this, developing case law under the amended rule reflects a problematic and unwitting split between two plausible readings of the amended rule – both of which have colorable support in the text – and that stands to make amendments less available.

Rule 15(a) historically allowed any pleading stating a claim to be amended once as a matter of course at any time before the service of a responsive pleading.<sup>181</sup> This language elegantly excluded answers and other pleadings that do not compel a responsive pleading, and sensibly allowed the claimant to amend as of right at any point before the end of the given period.<sup>182</sup> The prior language did not specify a beginning date for the plaintiff's right to amend as of course for the simple reason that there is no policy reason for doing so. The old rule presumed that the plaintiff would not waste this opportunity by filing an improvident or frivolous early amendment and, thus, concentrated on providing a clear termination point.<sup>183</sup> This rationale is equally true under the amended rule and is reflected in the stated goals of the 2009 amendment – providing equivalent treatment to responsive pleadings and Rule 12 motions and limiting the plaintiff's time to amend in response to each.

The third interpretation does not flow as easily from the text of amended Rule 15(a)(1) as the first and second possible interpretations of the rule. However, properly understood, the first and second interpretations have the potential to produce results that are anomalous at best and nonsensical at their worst. The third interpretation avoids these flaws, while accomplishing all of the policy goals of the amendment and better reflecting the expressed intent of the Advisory Committee. In addition, the third interpretation of the amended rule coherently meshes prior procedure with the goals behind the 2009 amendment and, thus is the interpretation that will come most naturally to judges and lawyers familiar with the practice for amending complaints as a matter of course under prior Rule 15(a)(1).

---

180. Many commentators report that the Supreme Court's decisions in *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009), and *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), have made pleading more difficult. See, e.g., Arthur R. Miller, *From Conley to Twombly to Iqbal: A Double Play on the Federal Rules of Civil Procedure*, 60 Duke L.J. 1, 18-36 (2010); Scott Dodson, *New Pleading*, *New Discovery*, 109 Mich. L. Rev. 53, 64-68 (2010).

181. FED. R. CIV. P. 15(a) (2009) (amended 2009) (Answers and other pleadings that do not compel a responsive pleading were, in turn, expressly addressed in former Rule 15(a)(1)(B)).

182. *Id.*

183. *Minutes: Civil Rules Advisory Committee, May 22-23, 2006*, *supra* note 86, at 24 (“[A] pleader recognizes the importance of the first amendment. After one amendment, it becomes more difficult to win permission to make another amendment. ‘Taking the first shot will be a matter for care.’”).

The ambiguity in the 2009 amendment to Rule 15(a)(1) will inevitably be resolved, either by a subsequent amendment or by developing a consensus through case law. The resulting rule should be devised with due regard for the history of Rule 15, the realities of modern litigation, and the stated purposes of the 2009 amendment. Optimally, this resolution will allow a continuous period for amending pleadings that state a claim that begins when the pleading is filed and that continues for twenty-one days after the service of the earlier of a responsive pleading or motion under Rule 12(b), (e), or (f).