

07-CV-012



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cc

Subject: Proposed Amendments to Federal Rules of Civil Procedure

Dear Secretary McCabe,

I apologize for the informality, but please allow me to submit via this e-mail message the following comments for the Committee's consideration regarding the recently proposed amendments to the Federal Rules of Civil Procedure

Rule 15

Though I agree that Rule 15(a)(1) should account for the motion to dismiss, I respectfully disagree with the idea that a party should be permitted to amend its pleading, as a matter of course, either after the service of a responsive pleading or a motion to dismiss (and certainly not up to 21 days after the earlier of those events). I understand that the proposed rule might permit a pleader to correct problems raised by a responsive pleading or motion, thus obviating (to some extent) the need for court action. But I believe that the balance would be better struck by placing more of a burden to avoid mistakes on the initial pleader. I understand that mistakes will still occur, and that those mistakes will continue to be brought to everyone's attention by a responsive pleading or motion. But even if those mistakes are fairly correctable (and often they are not), the court retains the discretion to grant leave to amend.

Another potential problem with the rule as proposed is the fact that a court is all but compelled to defer consideration on a motion to dismiss until the 21 day period expires. That does not seem very efficient.

Yet another potential problem with the rule as proposed is that it does not terminate the pleader's ability to amend as a matter of course in the situation where a responsive pleading (or motion to dismiss) is required, but not forthcoming (i.e., the potential default judgment situation). This might have been what the Committee intended, but it seems that a more definite termination of the right to amend as of course might be desirable.

I therefore propose the following alternative language for Rule 15(a)(1):

A party may amend its pleading once as a matter of course.
(A) if the pleading is one to which a responsive pleading is required, before the
earlier of

- (i) the service of a responsive pleading,
- (ii) the service of a motion under Rule 12(b), (e), or (f),
- (iii) the expiration of the time for service of a responsive pleading, or

(B) if the pleading is not one to which a responsive pleading is required, within 21

days after serving it

Rule 62.1

I agree that proposed Rule 62.1 is eminently pragmatic. Nonetheless, I object to this (and any) rule that purports to authorize courts to decide matters (or indicate how they might decide matters) that are not currently before them (Incidentally, I believe that Rule 50 suffers from the same flaw.) Though discerning "jurisdiction" in this context (if this is indeed a jurisdictional matter) might, at times, be difficult, that is beside the point. Either a court has "jurisdiction" of a case or it does not, and if it does not, then deciding matters relating to that case is improper, certainly as a matter of established principles of American legal process, if not also as a matter of constitutional justiciability.

Rule 81

Though this might be beyond the scope of this proposal, the Committee might consider eliminating the definition of "state law" (Rule 81(d)(1)) entirely. The definition currently in force certainly is under-inclusive, and it might be somewhat over-inclusive as well. The best solution might simply be no definition, leaving the matter for decision by the courts. This would not be an unusual tack, given that very, very few terms used in the Rules are formally defined therein.

Also, with respect to proposed Rule 81(d)(2) (as well as Rule 81(d)(1)), the Committee might want to consider (if it has not done so already) the fact that definitions framed only in terms of what is included, though perhaps helpful in resolving some ambiguities, can still leave a lot of unanswered questions. A better definition might be one that states specifically what is included (or, if not practicable, no definition).

Respectfully submitted

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