

## Alabama Rules of Civil Procedure

### III. PLEADINGS AND MOTIONS

#### Rule 15.

##### **Amended and supplemental pleadings.**

(a) *Amendments.* Unless a court has ordered otherwise, a party may amend a pleading without leave of court, but subject to disallowance on the court's own motion or a motion to strike of an adverse party, at any time more than forty-two (42) days before the first setting of the case for trial, and such amendment shall be freely allowed when justice so requires. Thereafter, a party may amend a pleading only by leave of court, and leave shall be given only upon a showing of good cause. A party shall plead in response to an amended pleading within the time remaining for a response to the original pleading or within ten (10) days after service of the amended pleading, whichever period may be longer, unless the court orders otherwise.

(b) *Amendments to conform to the evidence.* When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice the party in maintaining the party's action or defense upon the merits. The court may grant a continuance to enable the objecting party to meet such evidence. An amendment shall not be refused under subdivision (a) and (b) of this rule solely because it adds a claim or defense, changes a claim or defense, or works a complete change in parties. The Court is to be liberal in granting permission to amend when justice so requires.

(c) *Relation back of amendments.* An amendment of a pleading relates back to the date of the original pleading when

(1) relation back is permitted by the law that provides the statute of limitations applicable to the action, or

(2) the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, except as may be otherwise provided in Rule 13(c) for counterclaims maturing or acquired after pleading, or

(3) the amendment, other than one naming a party under the party's true name after having been initially sued under a fictitious name, changes the party or the naming of the party against whom a claim is asserted if the foregoing provision (2) is satisfied and, within the applicable period of limitations or one hundred twenty (120) days of the commencement of the action, whichever comes later, the party to be brought in by amendment (A) has received such notice of the institution of the action that the party will not be prejudiced in maintaining a defense on the merits, and (B) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against the party, or

(4) relation back is permitted by principles applicable to fictitious party practice pursuant to Rule 9(h).

(d) *Supplemental pleadings.* Upon motion of a party the court may, upon reasonable notice and upon such terms as are just, permit the party to serve a supplemental pleading setting forth transactions or occurrences or events which have happened since the date of the pleading sought to be supplemented. Permission may be granted even though the original pleading is defective in its statement of a claim for relief or defense. If the court deems it advisable that the adverse party plead to the supplemental pleading, it shall so order, specifying the time therefor.

(dc) *District court rule.* Rule 15 applies in the district courts except that the ten- (10-) day time limit in Rule 15(a) is reduced to seven (7) days.

[Amended eff. 6-17-75; Amended eff. 8-1-92; Amended eff. 10-1-95.]

### **Committee Comments on 1973 Adoption**

Under Rule 15(a) and (b) the test as to whether amendment is proper will be functional, rather than, as under present Alabama law, conceptual. Under the

rule it will be entirely irrelevant that a proposed amendment changes the cause of action or the theory of the case or that it states a claim arising out of a transaction different from that originally sued on or that it caused a change in parties. *International Ladies' Garment Workers' Union v. Donnelly Garment Co.*, 121 F.2d 561 (8<sup>th</sup> Cir.1941); *Technical Tape Corp. v. Minnesota Mining & Manufacturing Co.*, 200 F.2d 876 (2d Cir.1952); *Naamloze Vennootschap Suikerfabriek "Wono-Aseh" v. Chase National Bank*, 12 F.R.D. 261 (S.D.N.Y.1952); *Colstad v. Levine*, 243 Minn. 279, 285, 67 N.W.2d 648, 653 (1954); 6 Cyc.Fed.Proc. §§ 18.18, 18.19 (3d ed. 1951). The rule, instead, is that amendments are to be allowed "freely ... when justice so requires." Normally, an amendment should be denied only if the amendment would cause actual prejudice to the adverse party. 6 Wright & Miller, *Federal Practice & Procedure, Civil*, § 1484 (1971). Until a responsive pleading has been served or, if no such pleading is permitted and the action is not yet on the calendar, for 30 days, the party may amend as a matter of course. Thereafter amendment can be only on leave of court and requires a written motion and notice to all parties.

In Alabama actions at law the party seeking to put in evidence outside the pleadings must amend to cover that evidence if there is objection to it. Even if there is no objection, the pleader still runs the risk that any variance from his pleading more than minor in nature will result in the exclusion of the evidence beyond the scope of his pleading through the request for the affirmative charge. *Kurn v. Counts*, 247 Ala. 129, 22 So.2d 725 (1945); Rule 34, Circuit and Inferior Court Rules. In equity there is an even more stringent requirement that all proof be covered by appropriate pleadings. *Equitable Mortgage Co. v. Finley*, 133 Ala. 575, 31 So. 985 (1901); *Lockard v. Lockard*, 16 Ala. 423 (1849). Rule 15(b) makes drastic changes in the doctrine thus outlined. Under the rule where evidence is introduced or an issue raised with the express consent of the other party, or without objection from him, the pleadings "shall" be deemed amended to conform to such evidence. If the other party does object, but fails to persuade the court that he will be prejudiced in maintaining his claim or defense, the court must then grant leave to amend the pleadings to allow the evidence or the issue. If the objecting party can show prejudice, the court may grant him a continuance to meet the evidence and again should allow amendment of the pleadings. The only time that refusal to allow amendment can be justified is where the amendment and the evidence will not assist in reaching the merits of the action. A leading case illustrating the application of Rule 15(b) is *Robbins v. Jordan*, 181 F.2d 793 (D.C.Cir.1950). See 6 Wright & Miller, *Federal Practice and Procedure, Civil*, § 1495 (1971).

Specific provisions sanction the doctrine of relation back of amendments to the time of the filing of the original pleading in both law and equity in Alabama. Code 1940, Tit. 7, § 239; Equity Rule 28. Rule 15(c) makes only two changes in the existing law. By express provision it is applicable to all amendments, whether they relate to claims or to defenses. And it permits an amendment to relate back

which substitutes the real party in interest for a named plaintiff. *Kansas Electric Power Co. v. Leavenworth*, 194 F.2d 942 (10<sup>th</sup> Cir.1952); *Echevarria v. Texas Co.*, 31 F.Supp. 596 (D.Del.1940). Present Alabama law would probably not permit such an amendment. The rule also should end the lack of uniformity in Alabama decisions as to what is a “new cause of action,” such as to bar the amendment from relating back. Under the rule the test is whether the amended claim or defense arises out of the same “conduct, transaction, or occurrence” as the original. Most Alabama decisions are already to this effect. *Jewel Tea Co. v. Sklivis*, 235 Ala. 510, 179 So. 532 (1938); *Age-Herald Publishing Co. v. Waterman*, 188 Ala. 272, 66 So. 16 (1913). Alabama decisions which took a more restrictive view of what constitutes a “cause of action” will no longer be authoritative. E.g., *Sullivan v. North Pratt Coal Co.*, 205 Ala. 56, 87 So. 804 (1920); *Freeman v. Central of Georgia Ry. Co.*, 154 Ala. 619, 45 So. 898 (1908). See Clark, Code Pleading, § 118 (2d ed. 1947).

So as to eliminate the possibility of the result reached in *Stoner v. Terranella*, 372 F.2d 89 (6<sup>th</sup> Cir.1967), the first sentences of Rule 15(c) and Rule 13(c) have been altered from the Federal version. See 6 Wright & Miller, *Federal Practice and Procedure*, § 1430, pages 159, 160 (1971).

Note that the Rule treats amendments changing parties on the one hand, and amendments substituting real parties for fictitious parties on the other hand, separately. An amendment changing parties relates back if the requirements of Rule 15(c) are satisfied. An amendment substituting a real party for a fictitious party relates back provided that the provisions of Rule 9(h) are satisfied. See the notes to Rule 9 wherein it is stated that the fictitious party statute (Title 7, § 136, Code of Alabama) is the source of Rule 9(h) and the case-law construction of Title 7, § 136 should be consulted in application of Rule 9(h).

Supplementary pleadings seem to be unknown in actions of law in Alabama, and their use has been cut down in equity by Equity Rule 28 which provides for amendment of the pleadings as the means for setting out new matter occurring after the suit has been commenced. This is contrary to the historic practice of English Chancery. Rule 15(d) restores the ancient practice, and makes it applicable to all actions, whether heretofore “legal” or “equitable.” Under the rule supplemental pleadings are used to set forth events which have happened since the date of the pleading sought to be supplemented. Leave of court, on notice and motion, must be had to serve a supplemental pleading. The practice is usually liberal in allowing supplemental pleadings.

Some federal decisions have held that a supplemental complaint is proper only where the original complaint states a claim on which relief can be granted; thus where parties were before the court on a defective complaint it has been

held necessary to dismiss their action and make them begin again, even though events occurring after the commencement of the action have made clear the right to judicial relief. E.g., *Bonner v. Elizabeth Arden, Inc.*, 177 F.2d 703, 705 (2d Cir.1949). Alabama law is similar. *Scheerer v. Agee*, 113 Ala. 383, 21 So. 81 (1896). But this view is rejected by the better reasoned cases. *United States for use of Atkins v. Reiten*, 313 F.2d 673 (9<sup>th</sup> Cir.1963); *Friedman v. Typhoon Air Cond. Co.*, 31 F.R.D. 287 (E.D.N.Y., 1962); *Porter v. Block*, 156 F.2d 264 (4<sup>th</sup> Cir.1946); *Genuth v. National Biscuit Co.*, 81 F.Supp. 213 (S.D.N.Y., 1948), appeal dismissed, 177 F.2d 962 (2d Cir.1949); see *Technical Tape Corp. v. Minnesota Mining & Mfg. Co.*, 200 F.2d 876, 879 (2d Cir.1952); 3 Moore's *Federal Practice*, § 15.16 (2d Ed.1968). Rule 15(d) commands such a result.

### **Amendment of June 17, 1975, to Rule 15(a)**

Rule 15(a) as originally promulgated was the same as Federal Rule 15(a) except for a change of a time period. Under Federal Rule 15(a), the requirement of obtaining leave to amend is generally discussed in the context of an adversary rather than an ex parte proceeding. See, e.g., 6 Wright & Miller, *Federal Practice & Procedure*, § 1485 (1971). The last sentence of the first paragraph of the original Committee Comments (290 Ala. 434) reflected this view. However, Rule 15(a), as amended, renders this portion of the Comments obsolete.

The procedure required under original Rule 15(a) was objectionable in that it too frequently involved the time of the Court and counsel in the performance of what, in many instances, was a formality. Cognizance of this inconvenience led some Circuits, notably Jefferson County, to adopt the practice of allowing amendments without leave of court while hearing any objections on a motion to strike, notwithstanding the language of the rule. Rather than countenance a portion of a rule which has, in many instances, been honored only in the breach, the rule has been amended, thus legitimating the practice already in effect in some circuits. Of course, the standards governing allowance of amendments have not been modified by this change in mechanics.

### **Committee Comments to August 1, 1992, Amendment to Rule 15(a)**

The August 1, 1992, amendment was necessary to accommodate the constraints imposed by time standards for the disposition of litigation. Under the amendment, a party need not seek leave of court so long as the amendment is filed more than forty-two (42) days before the first trial setting of the case. An amendment filed earlier than 42 days before the first trial setting may be filed without leave of court, subject to disallowance on the court's own motion or on an adverse party's motion to strike. The rule makes it plain that such an amendment is to be freely allowed when justice so requires. However, an amendment may be

filed after such time only with leave of court, and such leave shall be given only upon a showing of good cause. Rule 40 requires a sixty- (60-) day notice of a trial setting. Thus, a party has an eighteen- (18-) day period within which to file an amendment after the notice of first setting for trial without the need for obtaining leave of court. Because an amendment within the forty-two- (42-) day period will frequently force a continuance of the trial of the case, the committee anticipates that such an amendment will not be allowed as a matter of course. Consequently, the rule requires a showing of good cause for any amendment within this period.

### **Committee Comments to October 1, 1995, Amendment to Rule 15**

Subdivision (c). This amendment adapts the form of Rule 15(c) to the present version of F.R.Civ.P. 15(c). It acknowledges the availability of relation back under circumstances where a federal cause of action would be saved by federal principles of relation back. It uses the period of limitations or one hundred twenty (120) days from the commencement of the action, whichever comes later, as the time in which a defendant who is improperly sued is vulnerable to notice of the existence of litigation, which would thereby make that person susceptible to joinder by an amendment that related back. It more clearly preserves the separate basis for relation back under Alabama fictitious party practice pursuant to Rule 9(h).

Subdivision (dc). An amendment to Rule 15(a), effective August 1, 1992, eliminated the thirty- (30-) day time period in the former Rule 15(a). This revision to Rule 15(dc) conforms district court practice.

### **Committee Comments Adopted February 13, 2004, to Rule 15**

The provisions of Rule 25, rather than the provisions of Rule 15, govern the procedure in the event of the death or incompetency of a party. Rule 25 also governs situations involving a transfer of interest or when a public officer ceases to hold office.

It should be noted that the allowance or disallowance of an amendment under Rule 15(a) is not dependent upon or determined by the application of Rule 15(c).

**Note from the reporter of decisions:** The order adopting the Committee Comments to Rules 5, 15, 21, 23, 24, and 42, Alabama Rules of Civil Procedure, effective February 13, 2004, is published in that volume of *Alabama Reporter* that contains Alabama cases from 865 So.2d.

