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To: **Honorable David F. Levi, Chair**
Standing Committee on Rules of Practice and Procedure

From: **Honorable Lee H. Rosenthal, Chair**
Advisory Committee on Federal Rules of Civil Procedure

Date: **December 12, 2006 (Revised June 29, 2007)**

Re: **Report of the Civil Rules Advisory Committee**

Introduction

The Civil Rules Advisory Committee met at the Vanderbilt Law School in Nashville, Tennessee, on September 7 and 8, 2006.

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Part II of this report presents items recommended for approval for publication next summer. These items are proposed amendments to Rules 13(f) and 15(a) on amending pleadings and to Rule 48 on jury polling, along with a proposed new Rule 62.1 on "indicative rulings"that addresses the authority of a district court to act on certain requests for relief after notice of appeal is filed. These were introduced in summary form as information items at the June 2006 meeting but with the recommendation that in light of other recent and anticipated amendments, publication would be in August 2007.

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PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE*

Rule 13. Counterclaim and Crossclaim

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~~**(f) Omitted Counterclaim.** The court may permit a party to amend a pleading to add a counterclaim if it was omitted through oversight, inadvertence, or excusable neglect or if justice so requires.~~

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Committee Note

Rule 13(f) is deleted as largely redundant and potentially misleading. An amendment to add a counterclaim will be governed by Rule 15. Rule 15(a)(1) permits some amendments to be made as a matter of course or with the opposing party's written consent. When the court's leave is required, the reasons described in Rule 13(f) for permitting amendment of a pleading to add an omitted counterclaim sound different from the general amendment standard in Rule 15(a)(2), but seem to be administered — as they should be — according to the same standard directing that leave should be freely given when justice so requires. The independent existence of Rule 13(f) has, however, created some uncertainty as to the availability of relation back of the amendment under Rule 15(c). See *6 C. Wright, A. Miller & M. Kane, Federal Practice & Procedure: Civil 2d, § 1430*. Deletion of Rule 13(f) ensures that relation back is governed by the tests that apply to all other pleading amendments.

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*New material is underlined; matter to be omitted is lined through. Includes amendments to rules that will take effect on December 1, 2007.

Rule 15. Amended and Supplemental 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) before being served with a responsive pleading;**~~ 21 days after serving it, 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**~~ 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.

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Committee Note

Rule 15(a) is amended to make three changes in the time allowed to make one amendment as a matter of course.

Former Rule 15(a) addressed amendment of a pleading to which a responsive pleading is required by distinguishing between the means used to challenge the pleading. Serving a responsive pleading terminated the right to amend. Serving a motion attacking the pleading did not terminate the right to amend, because a motion is not a "pleading" as defined in Rule 7. The right to amend survived

beyond decision of the motion unless the decision expressly cut off the right to amend.

The distinction drawn in former Rule 15(a) is changed in two ways. First, the right to amend once as a matter of course terminates 21 days after service of a motion under Rule 12(b), (e), or (f). This provision will force the pleader to consider carefully and promptly the wisdom of amending to meet the arguments in the motion. A responsive amendment may avoid the need to decide the motion or reduce the number of issues to be decided, and will expedite determination of issues that otherwise might be raised seriatim. It also should advance other pretrial proceedings.

Second, the right to amend once as a matter of course is no longer terminated by service of a responsive pleading. The responsive pleading may point out issues that the original pleader had not considered and persuade the pleader that amendment is wise. Just as amendment was permitted by former Rule 15(a) in response to a motion, so the amended rule permits one amendment as a matter of course in response to a responsive pleading. The right is subject to the same 21-day limit as the right to amend in response to a motion.

The 21-day periods to amend once as a matter of course after service of a responsive pleading or after service of a designated motion are not cumulative. If a responsive pleading is served after one of the designated motions is served, for example, there is no new 21-day period.

Finally, amended Rule 15(a) extends from 20 to 21 days the period to amend a pleading to which no responsive pleading is allowed and omits the provision that cuts off the right if the action is on the trial calendar. Rule 40 no longer refers to a trial calendar,** and many courts have abandoned formal trial calendars. It is more effective to rely on scheduling orders or other pretrial directions to establish time limits for amendment in the few situations that otherwise might allow one amendment as a matter of course at a time that would disrupt trial preparations. Leave to amend still can be sought under Rule 15(a)(2), or at and after trial under Rule 15(b).

** This statement anticipates the December 1, 2007 effective date of pending Rule 40 amendments.

Abrogation of Rule 13(f) establishes Rule 15 as the sole rule governing amendment of a pleading to add a counterclaim.

Discussion

Rule 13(f) now provides that the court may permit a party to "amend a pleading to add a counterclaim." The Style Project considered deleting this rule as redundant with Rule 15, but concluded that the change might be challenged as substantive. Despite the different language, however, there is no apparent reason to believe that courts apply different standards when an amendment seeks to add a counterclaim than when an amendment seeks to add a claim or crossclaim, or to make other changes. Nor is there any apparent reason to apply different standards. The existence of this provision, moreover, generates uncertainty whether a Rule 13(f) amendment is eligible for relation back under Rule 15(c). Abrogation will bring all pleading amendments within Rule 15.

Rule 15 has been on the Committee agenda for several years. Several possible amendments have been considered by two subcommittees. The current recommendations result from careful work by a subcommittee chaired by Judge Michael Baylson. The proposed Committee Notes provide most of the discussion needed to explain the proposed amendments.***

Present Rule 15(a) presents a clear distinction between the events that cut off the right to amend once as a matter of course a pleading to which a responsive pleading is required. Service of a responsive pleading terminates the right to amend. Service of a motion that attacks the pleading does not. Instead the right to amend survives the motion, argument of the motion, deliberation by the court, and — on terms that vary somewhat among the circuits — even a decision granting the motion. Only a judgment dismissing the action cuts off the right to amend. Neither the rule nor the cases that apply it identify clear reasons justifying this distinction and the proposed amendment eliminates it.

*** After years of off-and-on debate over whether to pursue proposals to amend Rule 15(c), the Committee decided not to do so. Close textual analysis reveals problems with the rule, but there is no indication in the reported cases that these problems have caused significant difficulties in practice. Work on Rule 15(c), further, would reopen serious questions. The first provision allows an amendment to relate back to the date of the pleading being amended when applicable limitations law allows relation back. The following provisions allow relation back despite the fact that applicable limitations law does not allow relation back. Relation back still can be justified to cure errors that are fairly characterized as procedural, but the line between providing ameliorative procedure and creating new limitations rules is thin. After exploring both narrow and broad proposals to amend the provisions that now appear in Rule 15(c)(2) and (3) (Rule 15(c)(1)(B) and (C) in the 2007 amendments), the Committee decided to decline further work on Rule 15.

Two significant changes are made. First, the distinction between a motion and a responsive pleading in present Rule 15(a) is eliminated. Instead of providing a right to amend once as a matter of course if the pleading is challenged by a motion — most commonly a motion to dismiss for failure to state a claim — the proposal to amend Rule 15(a) would cut off the right to amend 21 days after the motion is filed. Second, present Rule 15(a) cuts off the right to amend immediately on service of a responsive pleading. The proposed amendment would carry the right to amend forward for 21 days after the responsive pleading is served.

When this proposal was briefly discussed at the June 2006 Standing Committee meeting, one member noted that it may be important for defendants to have the ability to cut off a plaintiff's ability to amend a complaint without leave. Present Rule 15(a) ensures that a defendant can do that by serving an answer. Since that meeting, the member very helpfully provided further thoughts on the concerns he voiced and the Civil Rules Subcommittee had the opportunity to respond. This exchange was very helpful and we are grateful to the Standing Committee member for taking the time to give us the benefit of his thoughts in advance.

B. RULE 48: JURY POLLING

Rule 48(c) is recommended for publication at the same time as the amendments proposed for Rules 13(f) and 15, and as new Rule 62.1.

Rule 48. Number of Jurors; Verdict; Polling

(a) Number of Jurors. A jury must ~~initially have~~ begin with at least 6 and no more than 12 members, and each juror must participate in the verdict unless excused under Rule 47(c).

(b) Verdict. Unless the parties stipulate otherwise, the verdict must be unanimous and must be returned by a jury of at least 6 members.

(c) Polling. After a verdict is returned but before the jury is discharged, the court must on a party's request, or may on its own, poll the jurors individually. If the poll reveals a lack of unanimity or assent by the number of jurors required by the parties' stipulation, the court may direct the jury to deliberate further or may order a new trial.

Committee Note

Jury polling is added as new subdivision (c), which is drawn from Criminal Rule 31(d) with minor revisions to reflect Civil Rules Style and the parties' opportunity to stipulate to a nonunanimous verdict.

Discussion

Consideration of adding a provision for jury polling was suggested during Standing Committee discussion a few meetings ago. Criminal Rule 31(d) provides a good model that is adopted for this recommendation. One departure is required to account for the parties' opportunity to stipulate to a nonunanimous verdict. And a style departure was made by referring to ordering a new trial rather than declaring a mistrial and discharging the jury. The Civil Rules consistently refer to a new trial; the closest illustration in rules sequence is Rule 49(b), which deals with the similar problem of inconsistencies when a general verdict is supplemented by interrogatories.

Jury polling is occasionally resisted on the ground that it may lead to frequent retrials. The Federal Judicial Center gathered figures on more than 100,000 jury trials over the 25 years from 1980 to 2004. Fewer than 1% of these trials resulted in a hung jury. This figure suggests that the likely risk is not great.

C. RULE 62.1: "INDICATIVE RULINGS"

New Rule 62.1 is recommended for adoption:

Rule 62.1. Indicative Ruling on Motion for Relief That is Barred by a Pending Appeal

(a) Relief Pending Appeal. If a timely motion is made for relief that the court lacks authority to grant because of an appeal that has been docketed and is pending, the court may:

(1) defer considering the motion;

(2) deny the motion; or

(3) state either that it would grant the motion if the court of appeals remands for that purpose or that the motion raises a substantial issue.

(b) Notice to the Court of Appeals. The movant must promptly notify the circuit clerk under Federal Rule of Appellate Procedure 12.1 if the district court states that it would grant the motion or that the motion raises a substantial issue.

(c) Proceedings on Remand. The district court may decide the motion if the court of appeals remands for further proceedings.

Committee Note

This new rule adopts for any motion that the district court cannot grant because of a pending appeal the practice that most courts follow when a party makes a Rule 60(b) motion to vacate a judgment that is pending on appeal. After an appeal has been docketed and while it remains pending, the district court cannot grant a Rule 60(b) motion without a remand. But it can entertain the motion and deny it, defer consideration, or state that it would grant the motion if the action is remanded or that the motion raises a substantial issue. Experienced appeal lawyers often refer to the suggestion for remand as an "indicative ruling."

This clear procedure is helpful whenever relief is sought from an order that the court cannot reconsider because the order is the subject of a pending appeal. Rule 62.1 does not attempt to define the circumstances in which an appeal limits or defeats the district court's authority to act in face of a pending appeal. The rules that govern the relationship between trial courts and appellate courts may be complex, depending in part on the nature of the order and the source of appeal jurisdiction. Rule 62.1 applies only when those rules deprive the district court of authority to grant relief without appellate permission. If the district court concludes that it has authority to grant relief without appellate permission, it can act without falling back on the indicative ruling procedure.

To ensure proper coordination of proceedings in the district court and in the appellate court, the movant must notify the circuit clerk under Federal Rule of Appellate Procedure 12.1 if the district

court states that it would grant the motion or that the motion raises a substantial issue. Remand is in the court of appeals' discretion under Appellate Rule 12.1.

Often it will be wise for the district court to determine whether it in fact would grant the motion if the case is remanded for that purpose. But a motion may present complex issues that require extensive litigation and that may either be mooted or be presented in a different context by decision of the issues raised on appeal. In such circumstances the district court may prefer to state that the motion raises a substantial issue, and to state the reasons why it prefers to decide only if the court of appeals agrees that it would be useful to decide the motion before decision of the pending appeal. The district court is not bound to grant the motion after stating that the motion raises a substantial issue; further proceedings on remand may show that the motion ought not be granted.

2006 Discussion

New Rule 62.1 responds to a suggestion made to the Appellate Rules Committee by the Solicitor General. The Appellate Rules Committee concluded that any new rule provision would be better included in the Civil Rules because the underlying question involves district-court authority to act while an appeal is pending.

The basic approach recommended in this proposal is borrowed from the procedure followed when a Rule 60(b) motion is made for relief from a judgment while an appeal from the judgment is pending. The courts of appeals recognize that the appeal defeats district-court "jurisdiction" to grant the motion. But they all rule that the district court can consider the motion. Most agree that the district court retains jurisdiction to deny the motion. But all agree that the district court lacks "jurisdiction" to grant the motion. If the district court concludes that the motion should be granted, it can indicate that it would do so if the case is remanded for that purpose. (At least one circuit also requires a remand to establish authority to deny the motion after the district court indicates that it would deny if the case is remanded. And another court at times chooses to vacate the judgment with leave to reinstate the appeal after the district court acts on remand.)

The common Rule 60(b) procedure is satisfactory. It honors the wisdom of the rule that only one court should have control of a case at one time. It recognizes that the time to move under Rule 60(b) is not suspended by a pending appeal, so that the motion often must be made or lost before the appeal is decided. The refusal to suspend the time to move in turn rests on the importance of prompt inquiry into many of the issues that may be raised by such motions.

Although it is well established, the procedure incident to a Rule 60(b) motion made pending appeal is often overlooked by lawyers. Some district judges have been unaware of its existence. It would be useful to write this procedure into Rule 60(b) to make it well known, to make it consistent across all courts, and to provide some useful procedural incidents such as the movant's

duty to inform the court of appeals both when the motion is made and again when the district court acts on the motion.

The proposal goes beyond Rule 60(b) motions, generalizing the procedure to embrace any order that the district court lacks authority to revise because of a pending appeal. The orders most likely to be caught up in the broader rule will be interlocutory orders with respect to injunctions. Civil Rule 62(c) and Appellate Rule 8(a)(1)(C) seem to establish district-court authority to act despite a pending appeal, and indeed seem to indicate that relief should be sought first in the district court. Several courts of appeals, however, do not read those rules as they seem to be written. See 16 Federal Practice & Procedure: Jurisdiction 2d, § 3921.2. pp. 59-64. Rule 62.1 will provide an alternative path to district-court action in those circuits. And it will provide a clear source of authority for more exotic combinations of appeals taken while the district court continues to proceed with respect to matters not subject to the appeal.

Rule 62.1 does not attempt the difficult task of defining the circumstances in which a pending appeal ousts district-court power to act on a motion. It is drafted to apply only when an independent source of authority establishes the district court's lack of power.

The recommendation contemplates publication in a form that seeks comment on alternative wording. The question is whether the district court should be able to indicate that it believes the case should be remanded without committing itself to revise the order. One rule text version allows the district court to indicate that it "might" grant relief. The other version requires the district court to indicate that it "would" grant relief. The argument for insisting that the district court indicate that it "would" grant relief is that a case should be remanded, interrupting the progress of the appeal, only after the district court has invested the time and energy — and imposed the burden on the parties — required to reach final decision on the motion. The argument for recognizing authority to indicate that the district court "might" grant relief is that this approach better integrates the resources of both courts. Initial consideration may persuade the district court that the motion raises important questions, but that final resolution will require a heavy investment that should not be made without assurance that the court of appeals will not decide the appeal — perhaps mooting or changing the inquiry — before the inquiry is complete, or else refuse to remand after the district court indicates that it would grant the motion. Once the district court indicates that it might grant the motion, and explains the reasons why the issues seem important but too difficult to pursue to completion without a remand, the court of appeals has control. The court of appeals can balance the district court's statement of the reasons that support remand against the progress of the appeal and its own deliberations. These arguments would be summarized in the message transmitting the proposal for publication, with a request for comment on the choice.

2007 Discussion

A year ago the Advisory Committee recommended approval for publication of a new Civil Rule 62.1 on "indicative rulings." The recommendation was to defer publication to August 2007 as part of a larger package of Civil Rules proposals. The recommendation was discussed at the June 2006 and January 2007 Standing Committee meetings. The Appellate Rules Committee became convinced that it should consider a parallel provision in the Appellate Rules. The attached Appellate Rules Committee materials and draft Appellate Rule 12.1 provide the background not only for the Appellate Rules Committee's work but also for earlier work on Civil Rule 62.1.

The rule text recommended for approval for publication has been revised to reflect proposed Appellate Rule 12.1. An over- and underlined version is set out below to illustrate the revisions and to show the version that the Civil Rules Committee approved for publication before the Appellate Rules Committee recommended publication of Appellate Rule 12.1. The most important change results from the opportunity to rely on Appellate Rule 12.1 to address the form of the remand for further district-court proceedings. Subdivision (c) is shortened to become a formal recognition of remand that closes the circle opened by subdivisions (a) and (b).

Subdivision (b) also was revised to coordinate with Appellate Rule 12.1. It had been designed to invite comment on the choice between two alternatives for giving notice to the court of appeals. One alternative would require notice to the court of appeals when the motion for relief is filed in the district court and a second notice when the district court acts on the motion. That alternative had the advantage of giving the court of appeals early warning that it might want to adjust the progress of the appeal. It had a potential disadvantage arising from the frequent uncertainty whether a pending appeal ousts the district court's authority to grant the relief requested by a motion. In practice, notice would likely be given only when the question of district-court authority is identified. The other alternative, and the one adopted by Appellate Rule 12.1, requires notice to the court of appeals only when the district court states that it would grant the motion or that the motion raises a substantial issue. This second approach has been adopted for Rule 62.1(b) without suggesting any alternative for comment.

Other changes reflect the discussion at the January Standing Committee meeting. The Rule title was settled. There was rather extensive discussion of the question whether the court of appeals should be asked to consider remand if the district court indicates only that it "might" grant the motion for relief. The interim resolution was a recommendation to publish as "[might or] would grant"; the letter transmitting the proposal for publication would have invited comment on the question whether the rule should require that the district court state that it "would" grant relief, or should pave the way for appellate consideration if the district court states only that it "might" grant relief. This approach has been modified to acquiesce in the Appellate Rules Committee's recommendation. Proposed Rule 62.1 now imitates Appellate Rule 12.1, allowing the district court to state either that it would grant the motion on remand or instead to state that the motion raises a substantial issue. If a statement that the motion raises a substantial issue implies a slightly lower degree of district-court consideration or commitment, the difference does not warrant further negotiation. The most important point is that the court of appeals remains in control, deciding whether to remand in light of the progress of the appeal, the importance of the issues raised by the motion for relief, the prospect that relief would change or perhaps moot the issues on appeal, and the persuasiveness of the district court's explanation of the reasons for remand.