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September 19, 2019

Hon. John D. Bates
United States District Judge
United States Courthouse
333 Constitution Avenue, NW
Washington, DC 20001

Re: Amending as a matter of course under Fed. R. Civ. P. 15(a)(1)

Dear Judge Bates,

I write to you in your capacity as Chair of the Advisory Committee on Civil Rules.

For the second time in several months, I'm in a position of planning to file an amended complaint in a case well after the complaint was filed, but also well before the defendants have answered or filed a motion to dismiss. Rule 15(a)(1) provides that the opportunity to amend a complaint as a matter of course exists for 21 days after filing a complaint ((a)(1)(A)), and for a period of 21 days after an answer or certain motions are filed ((a)(1)(B)), but it does not provide such an opportunity during any intermediate period, thus requiring a plaintiff to file a motion for leave to file an amended complaint even if a defendant has not answered or filed one of the specified motions. The justification for that on-off-on-again sequence is difficult to discern.

Perhaps the Rules Committee assumed that the periods during which an amended complaint could be filed as a matter of course would be adjacent, because answers or motions to dismiss would be filed within 20 days after service of the summons and complaint. But that's very often not the case. As you know, federal defendants get 60 days to respond, and other defendants often seek and get extensions of time to respond. In other cases, motions for preliminary injunctions may take weeks or months to resolve, and frequently no answer or motion to dismiss is filed during that time. Yet I can't think of a good reason why a plaintiff that wishes to amend its complaint shouldn't be able to do so once as a matter of course at any time before an answer or motion to dismiss is filed, as well as within 21 days after such a filing (which was an excellent change in 2009).

I therefore wonder whether it would make sense to amend Rule 15(a)(1) to provide:

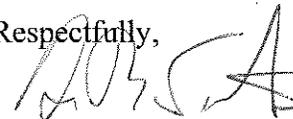
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(1) *Amending as a Matter of Course*. A party may amend its pleading once as a matter of course ~~within~~:

(A) within 21 days after serving it, or

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

Respectfully,

A handwritten signature in black ink, appearing to read 'A. B. Spitzer', written over the word 'Respectfully,'.

Arthur B. Spitzer