United States District Court
Northern District of Texas

Chambers of
Judge John McBryde

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March 29, 2012

12-CV-B

Hon. Mark R. Kravitz
Chairman of the Committee
on Rules of Practice and Procedure
c/o Judicial Conference of the United States
Washington, DC 20544

Dear Judge Kravitz:

I am directing this letter to you because of my understanding that you currently are serving as Chairman of the Judicial Conference Committee on Rules of Practice and Procedure.

Before the wording of Rule 15(a) of the Federal Rules of Civil Procedure was changed as part of the Style Project effective December 1, 2007, the final sentence of Rule 15(a) was worded as follows:

> A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within 10 days after the service of the amended pleading, whichever period may be longer, unless the court orders otherwise.

Throughout my years as a practicing attorney until I took the bench in 1990, and since I have been on the bench until I recently discovered a significant change in Rule 15(a), I have interpreted the part of the rule having to do with pleading in response to an amended pleading to require a response, subject to risk of entry of default if the response was not filed within the time specified by the rule.

When I recently was faced with an issue as to whether a default should be entered because of a defendant's failure after a period of months to respond to an amended pleading, I, fortunately, double-checked the wording of Rule 15(a) before making a decision. That is when I realized that the wording of the last sentence of the old Rule 15(a) had, as part of the Style Project, been redesignated Rule 15(a)(3) and that the wording had been changed to provide the following with respect to the filing

of a response to an amended pleading:

> **Time to Respond.** Unless the court orders otherwise, any required response to an amended pleading must be made within the time to respond to the original pleading or within 10 days after service of the amended pleading, whichever is later.[1]

(emphasis added).

My understanding is that the change in wording was pursuant to a 2007 amendment that had as its purpose the making of stylistic changes only. The purpose is described in the Advisory Committee Notes as follows:

> The language of Rule 15 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

(emphasis added).

As you can see by comparing the old with the new, a change has been made that renders the current Rule 15(a)(3) uncertain of meaning and no longer self-operative. The pre-Style Project version was self-operative, and clearly required, and fixed the deadline for, a response to an amended pleading so that the parties and the court would know in no uncertain terms that a responsive pleading must be filed and when it was to be filed. Now, attorneys and the courts will be hard put to find anything in the Rules that would enable them to know what is meant by the words "any required." The use of those words in the rule renders the rule virtually meaningless.

If a court takes the Advisory Committee Notes that the "changes are intended to be stylistic only" at heart, the court would assume that the new wording means the same as the old wording . . . that the time for filing a response to an amended

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[1]In 2009 the "10 days" was changed to "14 days."

pleading is "within the time remaining for response to the original pleading or within 10 days after service of the amended pleading, whichever period may be longer, unless the court otherwise orders." However, the courts could hardly act upon such an assumption because they would be faced with the proposition that few attorneys, if any, would understand that the current Rule 15(a)(3) really means the same as the pre-Style Project wording of the last sentence of the old Rule 15(a), and that the "any required" words in the Style Project version are to be disregarded.

I am sending an information copy of this letter to Amy Hale-Janeke, Head of Reference Services at the Fifth Circuit Court of Appeals Library, because she devoted significant time at my behest to an attempt to gain an understanding of why the words "any required" were put to the current version and what they mean. She visited with Fifth Circuit Judge Carl Stewart who, according to my understanding, chaired one of the advisory rules committees when the Style Project was functioning, and he recommended that she communicate with Professor Edward H. Cooper, who served as the reporter for the Advisory Committee on Civil Rules when the Style Project changes were made. Professor Cooper responded to her inquiry as follows:

> The change in Rule 15(a)(3) was made as part of the Style Project. It took effect on December 1, 2007.
>
> The purpose of the Style Project was to revise the language of the Civil Rules to make them easier to read, but without changing the meaning. The Committee Note for each rule begins with the same paragraph explaining this purpose.
>
> Before the restyling, all of Rule 15(a) was a single paragraph. The final sentence said: "A party shall plead in response to an amended pleading within the time remaining * * *["] and so on. That wording could be misread to include a command to plead in respon[se] to an amended pleading even though there was no obligation, or even option, to respond to the original pleading. Think of an answer that does not amend a counterclaim, followed by an amended answer

that still does not include a counterclaim. Although I have no independent recollection of this part of the process -- you will understand that an attempt to rewrite the entire body of civil rules without changing meaning was a big and long-drawn project -- I believe that the change to "any required response" was meant to clarify the ambiguity. If the original pleading did not require a responsive pleading, the amended pleading does not.

There may be some more "legislative history," but I have put all of my shelf-wide set of printed materials on the style project safely out of reach. The Administrative Office of the United States Courts has a full set of the materials; I am not sure whether they are easily searchable. For that matter, I'm not really sure whether they are available online at the AO Federal Rulemaking site. If you cannot find them on the site, contact the Rules Committee Support Office for help should your district judge want more. -- EHC

I have decided that I will not learn what the "any required" language means, and that I am not going to find an answer as to why it was put in the Style Project wording of the rule. Serious thought should be given to an amendment of Rule 15(a)(3) that would remove "any required" language from the rule. If that were to occur, the Style Project change in the rule, as was intended, would end up being stylistic only. Otherwise, if the language is left as it is, there has been a substantive change that, for all practical purposes, destroys the utility of the rule.

If, as Professor Cooper suggests, the change in wording was to make clear that there is no obligation to plead in response to an amended pleading even though there was no obligation, or even option, to respond to the original pleading, that problem could be solved by changing the words "amended pleading" as they appear in Rule 15(a)(3) to the words "amended complaint, counterclaim, cross-claim, or third-party complaint" or by use of some other wording that would identify the kinds of amended pleadings to which a response is required. Wording of that kind would be consistent with the wording used in Rule 12(a), which defines the deadlines for responding to original complaints, counterclaims,

and cross-claims. However, I do not see any problem with simply eliminating the words "any required." I am not aware of any instance when an attorney claimed, or a court found, that there was any ambiguity in the last sentence of the old Rule 15(a) that caused uncertainty as to the kinds of amended pleadings to which a response was required by the rule.

A reason why it is important for Rule 15(a) to be worded in such a way that a response to an amended pleading is required by a specified deadline is found in the requirements of Rule 8(b)(1) that "[i]n responding to a pleading, a party must: (A) state in short and plain terms its defenses to each claim asserted against it; and (B) admit or deny the allegations asserted against it by the opposing party." If a response to an amended pleading is not required, the parties and the courts will not benefit from the narrowing of the facts genuinely in dispute that occurs by the admissions or denials of the allegations in an amended pleading, and there will be uncertainty as to when the opposing party has an obligation to state its defenses to the claims asserted in the amended pleading (which may not have been asserted in the original pleading).

Would you be kind enough to put this letter in the hands of the committee, subcommittee, or person who would be in a position to explore the possibility of amending Rule 15(a), as I have suggested, and to pursue whatever avenues are appropriate to that end.

Thank you for your anticipated cooperation.

Yours truly,

JM/lr

cc: Ms. Amy Hale-Janeke
Head of Reference Services
Fifth Circuit Court of Appeals Library
600 Camp Street, Room 106
New Orleans, LA 70130

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