

08-CV-01565-PAB-BNB

## AMENDED AND SUPPLEMENTAL PLEADINGS

## Rule 15

cause" under Rule 16.<sup>98</sup> Then, even if the party establishes good cause to amend the scheduling order, the court may still deny leave to amend under Rule 15(a). For example, an amendment might be denied as futile under Rule 15(a) even if the party satisfied the good cause requirement under Rule 16(b)(4) by seeking the amendment diligently.

## Trial Amendments

**Issues tried without objection.** Rule 15(b) essentially holds that a case stands as tried even if it varies from the pleadings. Thus, when a party presents evidence at trial going to an unpleaded issue and the opposing party does not object, then the opposing party is deemed to have consented to trial of that issue and it is treated as if it had been pleaded.<sup>99</sup> In applying this rule, however, most courts construe failure to object as consent only when the evidence was not relevant to any pleaded issue.<sup>100</sup> But at least one court has applied Rule 15(b) to allow the plaintiff to add a state law claim after the verdict on the basis that the state law claim (and the proof to support it) was *consistent with* the evidence offered to support the pleaded federal claims.<sup>101</sup>

**Court may—but need not—conform the pleadings.** After the trial, the court may amend the pleadings to conform to the evidence presented at trial. But the court need not do so; the result will stand whether or not the pleadings are conformed

<sup>98</sup>See *Nourison Rug Corp. v. Parvizian*, 535 F.3d 295, 298 (4th Cir. 2008); *Sherman v. Winco Fireworks, Inc.*, 532 F.3d 709, 716, Prod. Liab. Rep. (CCH) P 18033, 70 Fed. R. Serv. 3d 1543 (8th Cir. 2008); *Kassner v. 2nd Avenue Delicatessen Inc.*, 496 F.3d 229, 243–44, 101 Fair Empl. Prac. Cas. (BNA) 259, 89 Empl. Prac. Dec. (CCH) P 42902, 68 Fed. R. Serv. 3d 835 (2d Cir. 2007) (Rule 16(b) good cause required for all post-deadline amendments, including amendments that otherwise would be “as of right”); *O’Connell v. Hyatt Hotels of Puerto Rico*, 357 F.3d 152, 154–55, 57 Fed. R. Serv. 3d 1184 (1st Cir. 2004) (citing cases from other circuits); *Leary v. Daeschner*, 349 F.3d 888, 906–07, 182 Ed. Law Rep. 743, 20 I.E.R. Cas. (BNA) 1148, 57 Fed. R. Serv. 3d 216, 2003 FED App. 0409P (6th Cir. 2003); *S&W Enterprises, L.L.C. v. SouthTrust Bank of Alabama, NA*, 315 F.3d 533, 536, 54 Fed. R. Serv. 3d 663 (5th Cir. 2003); *Parker v. Columbia Pictures Industries*, 204 F.3d 326, 339–40, 10 A.D. Cas. (BNA) 396, 24 Employee Benefits Cas. (BNA) 1214, 46 Fed. R. Serv. 3d 546 (2d Cir. 2000); *Sosa v. Airprint Systems, Inc.*, 133 F.3d 1417, 1419, 75 Fair Empl. Prac. Cas. (BNA) 1665, 72 Empl. Prac. Dec. (CCH) P 45215, 39 Fed. R. Serv. 3d 1181 (11th Cir. 1998).

<sup>99</sup>See Fed. R. Civ. P. 15(b)(2); *Loughridge v. Chiles Power Supply Co., Inc.*, 431 F.3d 1268, 1282 (10th Cir. 2005); *Triple Five of Minnesota, Inc. v. Simon*, 404 F.3d 1088, 1095 (8th Cir. 2005).

<sup>100</sup>See *Foraker v. Chaffinch*, 501 F.3d 231, 246, 26 I.E.R. Cas. (BNA) 863, 155 Lab. Cas. (CCH) P 60496 (3d Cir. 2007); *Sasse v. U.S. Dept. of Labor*, 409 F.3d 773, 781, 22 I.E.R. Cas. (BNA) 1665, 35 Envtl. L. Rep. 20109, 2005 FED App. 0234P (6th Cir. 2005); *Green Country Food Market, Inc. v. Bottling Group, LLC*, 371 F.3d 1275, 1280, 2004-1 Trade Cas. (CCH) ¶ 74454, 58 Fed. R. Serv. 3d 993 (10th Cir. 2004); *Kenda Corp., Inc. v. Pot O’Gold Money Leagues, Inc.*, 329 F.3d 216, 232, R.I.C.O. Bus. Disp. Guide (CCH) P 10474, 55 Fed. R. Serv. 3d 713 (1st Cir. 2003).

<sup>101</sup>See *Baker v. John Morrell & Co.*, 382 F.3d 816, 831, 85 Empl. Prac. Dec. (CCH) P 41731, 59 Fed. R. Serv. 3d 625 (8th Cir. 2004); see also *IES Industries, Inc. v. U.S.*, 349 F.3d 574, 579, 2003-2 U.S. Tax Cas. (CCH) P 50727, 57 Fed. R. Serv. 3d 206, 92 A.F.T.R.2d 2003-7038 (8th Cir. 2003) (conforming amendment regarding unpleaded affirmative defense).

Plaintiff's Exhibit