

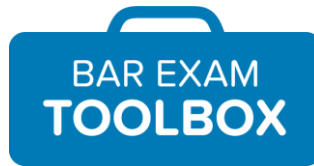
Lee Burgess: Welcome to the Bar Exam Toolbox podcast. Today, we're discussing amending pleadings, as part of our "Listen and Learn" series. Your Bar Exam Toolbox hosts are Alison Monahan and Lee Burgess, that's me. We're here to demystify the bar exam experience, so you can study effectively, stay sane, and hopefully pass and move on with your life. We're the co-creators of the [Law School Toolbox](#), the [Bar Exam Toolbox](#), and the career-related website [CareerDicta](#). Alison also runs [The Girl's Guide to Law School](#). If you enjoy the show, please leave a review on your favorite listening app, and check out our sister podcast, the [Law School Toolbox podcast](#). If you have any questions, don't hesitate to reach out to us. You can reach us via the [contact form](#) on BarExamToolbox.com, and we'd love to hear from you. And with that, let's get started.

Lee Burgess: Hi, and welcome back to our "Listen and Learn" series. Today, we will be discussing the Federal Rules of Civil Procedure – more specifically Rule 15, which deals with when a party can amend their pleadings. Parties seek to amend pleadings for a variety of reasons. Sometimes, they need to correct certain facts in their initial filing. Other times, they may want to add a new claim, affirmative defense, or even change or add a new party. So, it is important to know when a party may amend a pleading, and what elements they need to establish in order to be permitted to do so.

Lee Burgess: Before we dive into amendments, I want to give a quick refresh on the statute of limitations. One of the reasons Rule 15 can prove challenging for students is there are certain circumstances where the amended pleading must "relate back" to the initial complaint. And that requirement, which we'll discuss later in the podcast, depends upon whether or not the statute of limitations has run. So, having a solid grasp on what a statute of limitations is will make the amendment rules a whole lot easier.

Lee Burgess: A statute of limitations is essentially a prescribed time period that dictates how long a party has to file a claim after they suffer an injury. The clock starts to run on the date of injury, or on the date when the injury reasonably should have been discovered by the plaintiff. The plaintiff must file their lawsuit within the statutory period or they are out of luck. The importance of this concept to our discussion today should hopefully become clear in a moment. So, let's get started.

Lee Burgess: Rule 15 outlines three major circumstances under which a party is likely to seek to amend their complaint: (1) the statute of limitations has not yet run; (2) the statute of limitations has run, and the party is adding a new claim against an



existing party; or (3) the statute of limitations has run, and the party is adding a new claim against a new party.

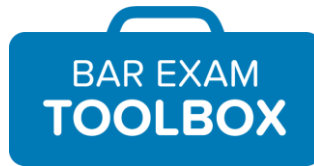
Lee Burgess: An easy way to think about this is to see each of these circumstances as a bucket. Within each bucket is a set of rules that applies only to that bucket. So, the first thing you want to do when approaching an amendment problem is to determine which of these three buckets you're in. Once you know that, you'll know which set of rules you need to apply.

Lee Burgess: So, let's start with our first bucket. What happens when a party wants to amend their pleading before the statute of limitations has run out? Every party may amend their pleading by right once within 21 days of filing. So, a plaintiff may amend their complaint one time within 21 days of the initial filing. They may add a new party, a new claim, add or change facts – anything they wish. Similarly, a defendant may amend their answer or any motion they filed within 21 days of serving it on the plaintiff. They may add an affirmative defense, file an answer if they only filed a motion initially, or vice versa.

Lee Burgess: Now, what if the party is looking to amend their pleading, but that 21-day period is up? Or maybe they're still within that 21-day window, but they've already amended their pleading once and need to do so again? In those circumstances, the party must obtain the consent of either the opposing party or the court. Rule 15 tells us that the court should give a party leave to amend their pleadings "when justice so requires". What this means is that the court is generally going to allow a party to amend their pleading, so long as they are not acting in bad faith, they have not repeatedly failed to cure the deficiencies in prior amendments, there won't be any undue delay in the proceedings, and the amendment won't unduly prejudice the opposing party.

Lee Burgess: Seems fairly straight forward so far, right? A party can amend by right within 21 days of filing. Outside of that timeframe, they must get permission from either the court or the opposing party.

Lee Burgess: Our next two buckets are where things start to get a bit trickier, because we're dealing with what happens when a party needs to amend their pleadings but the statute of limitations has run out. If you recall from earlier, a plaintiff cannot file a claim outside of the statutory period. Amending a complaint to add a new claim is essentially filing a new claim. So, in order to get around that pesky statute of limitations, the plaintiff must be able to show that their amended pleading relates back to their initial filing. If the amended complaint relates back, the court will consider the new claim to have been filed on the same date as the initial complaint.



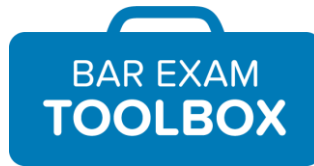
Lee Burgess: How a plaintiff establishes that their amended complaint relates back is going to depend on which of our final two buckets you're in. Is the plaintiff adding the new claim against an existing party or a new party?

Lee Burgess: When a party is looking to amend their pleading to add a new claim against an existing party – someone who has already been named a plaintiff or a defendant in the lawsuit at this point – they must show that the new claim arises out of the same conduct, transaction, or occurrence as the initial pleading. So, what you want to look at is what events led to the plaintiff's injury, and determine whether the new claim arises from those same events.

Lee Burgess: Our final bucket is a little more complicated. A new party is someone who is not yet a part of the lawsuit. A plaintiff is only going to be allowed to change or add a party when that party was the person the plaintiff intended to sue from the beginning. This can happen when the plaintiff was mistaken as to the defendant's identity. A classic example of this is the case [Krupski v. Costa Crociere](#). In that case the plaintiff was injured on a cruise ship operated by Costa Crociere, but initially filed their negligence action against the parent company Costa Cruise. What a plaintiff is not going to be permitted to do is to amend their complaint after the statute of limitations has run out to sue a party that they didn't think to sue before. The statute of limitations exists for a reason, and we don't want the amendment rules to become a means for plaintiffs to skirt around these laws.

Lee Burgess: So, how does a plaintiff establish that a new claim against a new party relates back? They must satisfy three elements. First, as with existing parties, the new claim must arise from the same occurrence as the initial claim. Second, the new party must have been aware of the lawsuit within 90 days of the initial complaint being filed. This can be shown in a number of ways. Someone could have told the new party about the lawsuit. The new party might have read about it in the news. In the Costa Crociere example, the complaint was served on their parent company, so they learned of the lawsuit from them. How the party learned of the suit does not matter. What's critical is that the plaintiff can show the party learned of the lawsuit at some point during that 90-day period.

Lee Burgess: The final element the plaintiff must show is that the new party knew or should have known that they would have been named a defendant in the action if not for a mistake. Remember, we aren't adding a new party we didn't think to sue until now. The new party should have been someone the plaintiff intended to name from the start. So, most importantly for this element, it must have been obvious in the complaint that the plaintiff meant to name them as a defendant. So, in the Costa Crociere example, Costa Crociere and Costa Cruises were two



closely related companies. Costa Crociere knew the plaintiff was a passenger on their cruise and knew of the lawsuit filed against Costa Cruises. So, they should have known that the plaintiff really intended to name them as the defendant.

Lee Burgess: In a contrasting example from the case [Singletary v. Pennsylvania Department of Corrections](#), the plaintiff filed a lawsuit against unnamed corrections officers for brutality he experienced in prison. He later sought to amend his complaint to name the prison psychologist. His request was denied because it was unlikely a psychologist would know the suit meant to include them as part of "unknown corrections officers".

Lee Burgess: So, once a plaintiff has established that their amendment relates back to their initial pleading, what does that actually mean? It means that we're going to consider their new claim to have been filed at the same time as their initial complaint. This is where the statute of limitations really comes into play, because the new claim may have a different statute of limitations than the initial claim. For instance, a plaintiff's initial negligence action may have a three-year statute of limitation, but the statute of limitation for their new strict liability claim may only be two years. So, the final question to ask is: If the plaintiff had included the new claim in their initial complaint, would it have been timely filed? If using our example, would it have been filed within two years of the plaintiff's injury? If so, the court should give the plaintiff leave to amend. If not, then the plaintiff will not be allowed to add the new claim.

Lee Burgess: I know that's a lot to take in all at once, so it's perfectly okay if everything we've covered this far still isn't completely clear to you. Sometimes these rules are easier to understand when we see them play out in context, so let's look at a hypothetical together. This example is adapted from Question 2 on the [July 2011 California bar exam](#). As I read through the question, try to keep in mind what we've learned so far. Can you spot that there is an issue of whether a party should be allowed to amend their initial pleading? Is the party looking to add a new claim or defense against an existing party or a new party? Has the statute of limitations run yet? Those are the initial key facts you want to look for when tackling an amendment to pleadings problem, as they'll point you towards the correct rule to apply. And with that, let's dive into the question:

Lee Burgess: "Doctor performed surgery on Perry's spine to insert a metal rod designed by Bolton, Inc. Shortly after the surgery, Perry developed severe back pain at the location where the rod was inserted. Within the applicable statute of limitations for a tort action for negligence, Perry sued Doctor in federal district court, alleging that she was negligent in using Bolton's rod for the kind of back condition from which he suffered. Shortly after the statute of limitations had



run, Perry learned through a newspaper article that Bolton had been sued by several patients who alleged that they suffered severe back pain after Bolton's rod was inserted into their spines during surgery. Perry immediately sought and obtained leave to amend his federal complaint to join and include a claim against Bolton, alleging it had negligently designed the rod. Bolton immediately filed a motion to dismiss Perry's claim against it on the grounds that the statute of limitations had already run. How should the court rule on Bolton's motion to dismiss?"

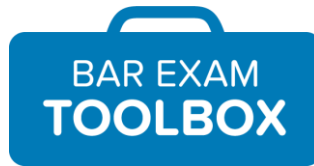
Lee Burgess: So, what do you think? Can Perry amend his complaint to add a negligence claim against Bolton? Our first step in answering that question is to consider those initial key facts I told you to keep an eye out for. Has the statute of limitations run? Well, yes. The writers of this hypo were kind enough in this fact pattern to tell us specifically that Perry did not find the newspaper article discussing the lawsuits against Bolton until after the statute of limitations had already run. So, we know that no matter what, Perry's amendment is going to have to relate back to his initial complaint in order to survive Bolton's motion to dismiss.

Lee Burgess: The other question we need to ask ourselves here is whether Perry is adding a new claim against an existing party or a new party. Perry's initial complaint only alleged negligence against Doctor. So, we know Perry is looking to add a new party after the statute of limitations has run, which means we now know which of our amendment rules to apply here.

Lee Burgess: If you recall from earlier in our podcast, a plaintiff looking to add a party after the statute of limitations has run must establish three elements: (1) the new claim arises out of the same transaction or occurrence as the initial complaint; (2) the new party received notice of the action within 90 days of its filing; and (3) the new party should have known they would have been named the defendant if not for a mistake.

Lee Burgess: So, let's start with the first element, as it is usually the most obvious. Does Perry's claim against Bolton arise out of the same transaction or occurrence as his claim against Doctor? Well, let's compare the two. Perry's initial claim against Doctor is for negligence in how he inserted the rod during Perry's spine surgery. Perry is looking to add a claim against Bolton for negligently designing this rod. Both claims arise out of the rod insertion during Perry's back surgery, so the first element is satisfied here.

Lee Burgess: Next, we need to determine whether Bolton knew about Perry's claim against Doctor within 90 days of its filing. It is not particularly clear from the facts provided whether Bolton knew about Perry's lawsuit or not. There's no



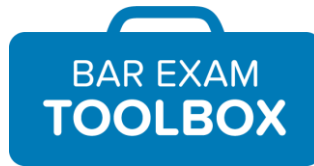
indication that Bolton ever received a copy of Perry's initial complaint, that anyone told it about the lawsuit, or even that someone at the company read about it in a news article. No matter what type of hypo you are dealing with, you never want to assume facts that aren't given. So, it seems highly likely here that Bolton knew nothing about Perry's claim against Doctor within the applicable timeframe. If Perry could somehow establish that Bolton was aware of the filing within that 90-day period, then this element would be satisfied. Otherwise, it would not be and the court would grant Bolton's motion to dismiss.

Lee Burgess: You would never want to end your essay there though. It's important to address each element, even if you think one fails early on. So, let's consider for a second that Bolton did know about Perry's lawsuit against Doctor. Would they have known, or should they have known, that Perry meant to name him as the defendant? This seems unlikely. Perry's initial claim was against Doctor for negligently inserting Bolton's rod when it wasn't meant for his type of back injury. Perry never alleged that there was anything wrong with the rod itself. So, there's no mistake of identity here. Perry always intended to sue Doctor. He only considered suing Bolton after he learned other patients had sued the company for similar severe post-op back pain. Even if Bolton knew of the lawsuit, there was no indication in the claim that would lead it to believe Perry originally meant to sue them instead of Doctor.

Lee Burgess: Since Perry would be unable to establish two of the three required elements, the conclusion here is that Perry's amended complaint does not relate back, and the court should grant Bolton's motion to dismiss.

Lee Burgess: Hopefully this hypothetical helped lend some context to how these issues might play out in the real world. Let's walk through another example to be sure. This hypothetical is pulled from Question 5 on the [February 2013 California bar exam](#), but we've edited it a bit to highlight only the amendment issue:

Lee Burgess: "In March 2008, Pat learned that Devon Corp. may have been illegally releasing toxic chemicals into the air near her home. In February 2011, Pat sued Devon in federal court, alleging a cause of action for negligence and seeking damages for a persistent cough. In October 2012, while the lawsuit was still pending, Pat learned from a scientific report in a newspaper that the chemicals Devon released cause lung cancer. In November 2012, Pat amended her complaint to add a cause of action for strict liability and sought to require Devon to pay for preventative medical monitoring of her lungs. Devon moved to dismiss Pat's strict liability cause of action on the basis that the applicable three-year statute of limitations had run."



Lee Burgess: Okay, first things first. We want to answer our initial key-fact questions, so we can determine the correct amendment rule to apply here. Has the statute of limitations run? The answer to this is not quite as clear as in our first example. The examiners don't tell us this time, so we have to determine that for ourselves. The fact pattern tells us that the applicable statute of limitations for strict liability is three years. Pat first learned Devon was releasing toxic chemicals into the air in March 2008. So, that's when the statute began to run, which means the statute ran out in March 2011. Pat amended her complaint in November 2012, so the statute had already run out at that point and her amended complaint will need to relate back to her initial pleading.

Lee Burgess: The next question to address is whether Pat is adding a new claim against an existing party or a new party? This is fairly straight forward. Pat initially filed a negligence action against Devon in March 2008. She amended her complaint in November 2012 to add a strict liability claim against Devon as well. Since Devon was a defendant in the initial pleading, Pat is only seeking to add a new claim.

Lee Burgess: As you may remember, the rule for adding a new claim against an existing party is much simpler than adding a new party. The plaintiff only needs to establish that the new claim arises from the same transaction or occurrence as the initial claim.

Lee Burgess: So, what do we think? Has Pat established that here? Pat's strict liability claim arises from Devon's alleged release of toxic chemicals into the air, same as her negligence claim. Her strict liability claim, therefore, relates back to the date she filed her initial complaint in February 2011. As we discussed earlier, the statute of limitations did not run out until March of 2011. So, Pat's strict liability claim would have been timely filed within the three-year statute of limitations, and the court should deny Devon's motion to dismiss.

Lee Burgess: And with that, we're out of time! If you enjoyed this episode of the Bar Exam Toolbox podcast, please take a second to leave a review and rating on your favorite listening app. We'd really appreciate it. And be sure to subscribe so you don't miss anything. If you have any questions or comments, please don't hesitate to reach out to myself or Alison at lee@barexamtoolbox.com or alison@barexamtoolbox.com. Or you can always contact us via our website [contact form](http://BarExamToolbox.com/contact-form) at BarExamToolbox.com. Thanks for listening, and we'll talk soon!

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