

Civil Procedure—Complaint Amending Jurisdictional Basis Given Effect When Filed as a Matter of Right—*ConnectU L.L.C. v. Zuckerberg*, 522 F.3d 82 (1st Cir. 2008)

Rule 8(a) of the Federal Rules of Civil Procedure requires a plaintiff to plead the basis for the court’s jurisdiction in his or her complaint.¹ Rule 15(a) allows a plaintiff to amend his or her complaint as a matter of right, provided that the defendant has not previously served a responsive pleading.² In *ConnectU L.L.C. v. Zuckerberg*,³ the First Circuit considered in a matter of first impression whether an amended complaint that switches from diversity of citizenship jurisdiction to federal question jurisdiction is effective when filed as of right prior to any jurisdictional challenge.⁴ The court held that the jurisdictional claim in the amended complaint conferred jurisdiction because it superseded and replaced the original complaint.⁵

Harvard students Tyler Winklevoss, Cameron Winklevoss, and Divya Narendra (the Founders) planned to create a social networking Web site for college students.⁶ The Founders asked Mark Zuckerberg, another Harvard student who was skilled in programming, to aid them in the technical development of their Web site, to which Zuckerberg agreed.⁷ According to the Founders, Zuckerberg stole their idea, business plan, and unfinished source code and launched a competing social networking Web site, thefacebook.com (Facebook).⁸ By the time the Founders launched their own site, connectU.com,

1. See FED. R. CIV. P. 8(a) (defining general rules of pleading). Rule 8(a) states, “A pleading that states a claim for relief must contain: (1) a short and plain statement of the grounds for the court’s jurisdiction” *Id.*; see also 28 U.S.C. § 1331 (2000) (providing federal district courts with jurisdiction over claims based on U.S. Constitution, laws, or treaties); 28 U.S.C. § 1332(a)(1) (2000) (providing federal district courts with jurisdiction based on parties’ diversity of citizenship); BLACK’S LAW DICTIONARY 123 (8th ed. 2004) (defining “complaint” as pleading stating basis for jurisdiction and claim for relief).

2. See FED. R. CIV. P. 15(a) (outlining rule for amendments to pleadings before trial). According to Rule 15(a), “A party may amend its pleading once as a matter of course: (A) before being served with a responsive pleading” *Id.*

3. 522 F.3d 82 (1st Cir. 2008).

4. See *id.* at 85 (setting forth issue before First Circuit); see also Georgene Vairo, *Vairo on ConnectU LLC v. Zuckerberg*, LEXISNEXIS EXPERT COMMENTARY, Oct. 30, 2008, available at 2008 Emerging Issues 2361 (describing case as significant because it raises question of first impression); Posting of S. COTUS to Appellate Law & Practice, <http://appellate.typepad.com/appellate/2008/04/ca1-face-off-on.html> (Apr. 3, 2008, 17:15 EST) (discussing matter of first impression addressed by court).

5. 522 F.3d at 96 (concluding amended complaint constituted jurisdictional hook under federal rules).

6. See *id.* at 86 (describing Founders’ idea for Web site).

7. See *id.* (detailing Founders’ request for help). The Founders asked Zuckerberg to help complete the proposed Web site’s source code because they lacked the necessary programming expertise. *Id.*

8. See *id.* (detailing alleged facts giving rise to Founders’ complaint); Matthew C. Harper-Nixon, *Switch of Jurisdictional Basis Is OK*, MASS. LAW. WKLY., Apr. 14, 2008, at 36 (discussing underlying conflict of case). See generally Facebook Factsheet, <http://www.facebook.com/press/info.php?factsheet> (last visited Feb.

Facebook already had a tremendous amount of user traffic, which made it very difficult for the Founders to compete.⁹

On September 2, 2004, ConnectU LLC (ConnectU) filed a diversity action in the United States District Court for the District of Massachusetts against Zuckerberg and five other defendants.¹⁰ On October 28, 2004, ConnectU filed an amended complaint that added a federal-law claim for copyright infringement and premised jurisdiction solely on the existence of a federal question.¹¹ ConnectU served the amended complaint after registering a copyright for its source code and before Zuckerberg filed a responsive pleading.¹²

Almost one year later, Zuckerberg moved to dismiss for lack of subject matter jurisdiction, contending that the original complaint failed to allege complete diversity of citizenship and that the amendment was therefore invalid.¹³ The district court agreed that diversity of citizenship did not exist at the time of filing and dismissed the case for lack of jurisdiction.¹⁴ On appeal,

27, 2009) (describing Facebook as facilitating sharing of information through digital mapping of real world social connections).

9. See 522 F.3d at 86 (detailing Facebook's success). As of March 2008, Facebook had over 60,000,000 users and was the fifth most trafficked Web site in the United States. *Id.* at 86 n.1.

10. See *id.* at 86 (describing complaint). ConnectU served the complaint against Mark Zuckerberg, Dustin Moskovitz, Eduardo Saverin, Andrew McCollum, Christopher Hughes, and Facebook itself. *Id.* The complaint linked the three Founders with ConnectU and asserted numerous state-law claims arising from the alleged misappropriation and unauthorized use of ConnectU's confidential source code and business plan. *Id.*

11. See *id.* (describing amended complaint). The amended complaint removed diversity as the basis for federal subject-matter jurisdiction and based it instead on federal-question jurisdiction. *Id.* The newly asserted copyright-infringement claim provided the basis for federal-question jurisdiction. *Id.* The complaint asserted supplemental jurisdiction over additional state-law claims. *Id.*

12. See *ConnectU L.L.C. v. Zuckerberg*, 482 F. Supp. 2d 3, 5, 5 n.2 (D. Mass. 2007) (detailing actions of ConnectU in amending complaint and registering copyright), *rev'd*, 522 F.3d 82 (1st Cir. 2008). ConnectU registered the Web site's source code with the United States Copyright Office approximately two weeks prior to filing the amended complaint and before Zuckerberg filed a responsive pleading. *Id.*

13. See 522 F.3d at 87 (setting forth Zuckerberg's lack of jurisdiction argument). After looking to the First Circuit's decision in *Pramco, L.L.C. v. San Juan Bay Marina*, which stood for the proposition that an LLC's citizenship turns on its members' citizenship, Zuckerberg asserted that complete diversity was lacking because both Zuckerberg and Narendra, whom Zuckerberg claimed was a member of ConnectU at the time of filing, were both citizens of New York. 435 F.3d 51, 54-55 (1st Cir. 2006). Zuckerberg argued that an action originally filed under diversity jurisdiction must "live or die from a jurisdictional standpoint as of the time of filing regardless of subsequent changes." 522 F.3d at 90. See generally *ConnectU L.L.C. v. Zuckerberg*, 482 F. Supp. 2d 3, 5 (D. Mass. 2007) (describing motion to dismiss and arguments for and against the court maintaining jurisdiction), *rev'd*, 522 F.3d 82 (1st Cir. 2008). Zuckerberg argued that the court lacked jurisdiction because diversity must exist at the time of filing, as per the time-of-filing rule. *Id.* at 5-6. ConnectU countered that its amended complaint superseded the original complaint and therefore diversity became a non-issue when the amended complaint premised jurisdiction on the existence of a federal question. *Id.* at 6. In the alternative, ConnectU maintained that the parties in the original complaint were diverse at the time of filing because Narendra was not an actual member of the LLC at that point. 522 F.3d at 87.

14. See *ConnectU L.L.C. v. Zuckerberg*, 482 F. Supp. 2d 3, 32 (D. Mass. 2007) (finding court lacked subject-matter jurisdiction), *rev'd*, 522 F.3d 82 (1st Cir. 2008). The court ruled that the parties had failed to establish that ConnectU had *any* members on the date of filing. *Id.* at 27. Because the citizenship of an LLC is based on its members' citizenship, having no members rendered ConnectU stateless. *Id.* In such a case, a party cannot meet the requirements of § 1332(a)(1) for diversity of citizenship jurisdiction. *Id.* Therefore, the court

the First Circuit reversed the dismissal and held that the district court clearly erred in looking to the original complaint for purposes of determining jurisdiction.¹⁵

Rule 15 of the Federal Rules of Civil Procedure sets forth the rules that control amendments to complaints.¹⁶ Rule 15(a) permits a party to amend its complaint “[o]nce as a matter of course” at any time before the opposing party serves a responsive pleading.¹⁷ Once a party files an amended complaint, the amended complaint supersedes the original complaint, making the latter obsolete.¹⁸ Rule 15(c) permits a plaintiff to avoid the preclusive effect of a statute of limitations by relating back the amendment to the time of filing of the original complaint.¹⁹ The relation back doctrine, however, does not cure

held that the complaint should be dismissed for lack of subject-matter jurisdiction. *Id.*

15. 522 F.3d at 96 (concluding district court erred because jurisdictional basis in amended complaint controlled jurisdictional question).

16. See FED. R. CIV. P. 15 (outlining federal rule for amending complaints).

17. See *supra* note 2 (explaining rule for amending complaints); see also *Integrated Tech. & Dev., Inc. v. Rosenfield*, 103 F. Supp. 2d 574, 578-79 (E.D.N.Y. 2000) (explaining difference between amendment with leave and amendment as of right). In *Integrated Technology*, the court held that when amendment of a complaint can only be obtained by leave of the court, the court cannot grant such leave if subject-matter jurisdiction is lacking in the original complaint. *Id.* If the plaintiff can amend the complaint as of right, however, no judicial intervention is necessary to permit the amendment and the absence of federal subject-matter jurisdiction poses no obstacle. *Id.*

18. See *Rockwell Int’l Corp. v. United States*, 549 U.S. 457, 471-74 (2007) (describing effect of amending complaints). In *Rockwell*, the Supreme Court stated that “when a plaintiff files a complaint in federal court and then voluntarily amends the complaint, courts look to the amended complaint to determine jurisdiction.” *Id.* at 473; see also *Kolling v. Am. Power Conversion Corp.*, 347 F.3d 11, 16 (1st Cir. 2003) (explaining amended complaint supersedes original and therefore strips it of purpose); *InterGen N.V. v. Grina*, 344 F.3d 134, 145 (1st Cir. 2003) (indicating facts in original complaint but not incorporated in amended complaint not binding on pleader); *King v. Dogan*, 31 F.3d 344, 346 (5th Cir. 1994) (explaining original complaint, superseded by amended complaint, is of no legal effect); *Boelens v. Redman Homes, Inc.*, 759 F.2d 504, 508 (5th Cir. 1985) (concluding court should look to amended complaint when determining basis for jurisdiction); 6 CHARLES ALAN WRIGHT ET AL., *FEDERAL PRACTICE AND PROCEDURE* § 1476 (2d ed. 2008) (stating “[o]nce an amended pleading is interposed, the original pleading no longer performs any function in the case”).

19. See FED. R. CIV. P. 15(c) (outlining parameters for relation back of amended pleadings). Rule 15(c) states as follows:

(c) Relation Back of Amendments.

(1) *When an Amendment Relates Back.* An amendment to a pleading relates back to the date of the original pleading when:

(A) the law that provides the applicable statute of limitations allows relation back;

(B) the amendment asserts a claim or defense that arose out of the conduct, transaction, or occurrence set out—or attempted to be set out—in the original pleading; or

(C) the amendment changes the party or the naming of the party against whom a claim is asserted, if Rule 15(c)(1)(B) is satisfied and if, within the period provided by Rule 4(m) for serving the summons and complaint, the party to be brought in by amendment:

(i) received such notice of the action that it will not be prejudiced in defending on the merits; and

(ii) knew or should have known that the action would have been brought against it, but for a mistake concerning the proper party’s identity.

FED. R. CIV. P. 15(c)

jurisdictional defects in an earlier pleading.²⁰

A party asserting diversity jurisdiction must show that such diversity existed at the time of filing.²¹ Diversity jurisdiction requires complete diversity, which means that no plaintiff may be a citizen of the same state as any defendant.²² Federal courts determine such citizenship based on the filing date of the complaint.²³ In *Grupo Dataflux v. Atlas Global Group*,²⁴ the Court reaffirmed this principle, known as the time-of-filing rule, holding that a party's postfiling change in citizenship cannot cure a lack of diversity subject matter jurisdiction in the original filing.²⁵

Courts consistently apply the time-of-filing rule in diversity cases, but refrain from doing so in federal-question cases.²⁶ Diversity cases and cases of removal raise heightened concerns about forum shopping that justify the use of the rule.²⁷ Courts are careful not to import the time-of-filing rule indiscriminately into the federal-question realm where these concerns are

20. See David D. Siegel, *Lack of Federal Subject Matter Jurisdiction for Want of Diversity Is Cured by Adding Federal Claim in Amended Complaint*, 197 SIEGEL'S PRAC. REV. 2, 2 (2008) (citing *Zuckerberg* court's finding that Rule 15(c) irrelevant where statute of limitations not at issue); WRIGHT ET AL., *supra* note 18, § 1497 (stating rationale of Rule 15(c) is to ameliorate effect of statute of limitations on amended complaints).

21. See *Grupo Dataflux v. Atlas Global Group*, 541 U.S. 567, 569-70 (2004) (explaining process for determining existence of diversity). *Grupo* expressed the general rule that the court should look to the facts as they exist at the time of filing in order to determine citizenship of the parties in a diversity action. *Id.*; see also Don Zupanec, *Complaint—Amendment—New Jurisdictional Grounds—“Time-of-Filing” Rule*, 23 NO. 5 FED. LITIGATOR 5, 5-7 (2008) (discussing use of time-of-filing rule).

22. See *Strawbridge v. Curtiss*, 7 U.S. (3 Cranch) 267, 267 (1806) (establishing complete-diversity rule); *Am. Fiber & Finishing, Inc. v. Tyco Healthcare Group, L.P.*, 362 F.3d 136, 142 (1st Cir. 2004) (holding that amending complaint to replace diverse defendant with nondiverse defendant destroyed diversity).

23. *Mullan v. Torrance*, 22 U.S. (9 Wheat) 537, 539 (1824) (holding jurisdiction depends upon facts as they existed at time action brought).

24. 541 U.S. 567, 582 (2004).

25. See *Grupo Dataflux v. Atlas Global Group*, 541 U.S. 567, 582 (2004) (holding change in plaintiff's citizenship after filing complaint could not cure defect in diversity jurisdiction). In *Grupo Dataflux*, a Texas limited partnership invoked diversity jurisdiction and filed a breach of contract action in federal district court against a Mexican corporation. *Id.* at 568. After an adverse verdict, the defendant moved to dismiss for lack of subject-matter jurisdiction, alleging that the parties were not wholly diverse at the time of suit. *Id.* at 569. The district court determined that on the filing date the plaintiff had included two Mexican nationals among its members. *Id.* For diversity purposes, it was thus a citizen of Mexico, and complete diversity was lacking. *Id.* On appeal, the plaintiff argued that the two Mexican nationals had been dropped from the partnership prior to trial and, thus, should be disregarded for purposes of a diversity analysis. *Id.* The court of appeals agreed. *Id.* at 569-70. The Supreme Court reversed, holding that the time-of-filing rule “measures all challenges to subject-matter jurisdiction premised upon diversity of citizenship against the state of facts that existed at the time of filing.” *Id.* at 571.

26. See *New Rock Asset Partners, L.P. v. Preferred Entity Advancements, Inc.*, 101 F.3d 1492, 1503 (3d Cir. 1996) (stating rule applied only rarely to federal-question cases in which claims were removed); *Shaw v. Gwatney*, 795 F.2d 1351, 1354 (8th Cir. 1986) (declining to apply time-of-filing rule in federal-question case).

27. See *New Rock Asset Partners, L.P. v. Preferred Entity Advancements, Inc.*, 101 F.3d 1492, 1503 (3d Cir. 1996) (setting out policy rationale for time-of-filing rule). “[T]he underlying concern of the time of filing rule was the risk that parties would deploy procedural tactics to manipulate federal jurisdiction.” *Id.*; see also *Rockwell Int'l Corp. v. United States*, 549 U.S. 457, 474 n.6 (2007) (suggesting forum-manipulation concern in removal cases nonexistent where plaintiff chooses forum and then alters through amendment).

almost nonexistent.²⁸ No court has ever read the time-of-filing rule to bar a plaintiff from changing jurisdictional postures prior to a jurisdictional challenge from the defendant.²⁹

In *ConnectU L.L.C. v. Zuckerberg*, the First Circuit determined that the amended complaint validly established federal-question subject matter jurisdiction.³⁰ In reaching this conclusion, the First Circuit reasoned that the amendment, filed as a matter of right, superseded and replaced the original complaint, thus transforming the action into a federal-question case.³¹ The First Circuit concluded that the time-of-filing rule was inapplicable to what had become a federal-question case.³² The court reasoned that the essence of the rule applies most obviously in diversity cases where there are legitimate concerns about forum shopping and manipulating diversity that are not present in federal-question cases.³³ The court rejected Zuckerberg's argument that ConnectU's complaint could not relate back to an earlier pleading over which the court had no jurisdiction.³⁴ The court reasoned that ConnectU's amended complaint did not "cure" a jurisdictional defect with Rule 15(c)'s relation back mechanism but instead replaced the original complaint in its entirety.³⁵

The First Circuit stressed that the amended complaint became the operative pleading before the defendant made any jurisdictional challenge.³⁶ The court distinguished ConnectU's amended complaint from a motion for leave to file an amended complaint, which would implicate the court's authority and require it to address any jurisdictional concerns.³⁷ The First Circuit concluded that when a plaintiff amends its complaint as of right, the Federal Rules of Civil Procedure operate mechanically.³⁸ Therefore, the "absence of federal subject matter jurisdiction in the original complaint" posed "no obstacle to the consideration of an amended complaint."³⁹

In *ConnectU L.L.C. v. Zuckerberg*, the First Circuit correctly resolved an

28. See *New Rock Asset Partners, L.P. v. Preferred Entity Advancements, Inc.*, 101 F.3d 1492, 1503 (3d Cir. 1996) (explaining time-of-filing rule not needed in federal-question cases).

29. See 522 F.3d at 92 (acknowledging lack of precedent on point).

30. See *id.* at 96 (determining district court mistakenly granted defendant's motion to dismiss).

31. See *id.* at 91 (indicating amendment preceding responsive pleading effective as matter of right).

32. See *id.* at 92 (rejecting use of time-of-filing rule); see also *supra* notes 27-28 and accompanying text (discussing purpose and use of time-of-filing rule).

33. See 522 F.3d at 92 (discussing when concerns of forum shopping arise). The court noted that concerns of forum shopping and manipulation are not present in most federal-question cases. *Id.*

34. *Id.* at 94 (holding Rule 15(c) inapplicable).

35. *Id.* (rejecting use of Rule 15(c)'s relation back mechanism). The court explained that the amended complaint replaced the original complaint in its entirety at a point before Zuckerberg challenged the district court's jurisdiction. *Id.*

36. See *id.* at 95-96 (noting amended complaint filed as of right and thus operative without judicial intervention).

37. See 522 F.3d at 96 (explaining motion for leave to amend pleading implicates court's authority).

38. See *id.* (noting automatic operation of procedural rules).

39. *Id.* (concluding amended complaint satisfied jurisdictional inquiry).

issue of first impression.⁴⁰ The court did not depart from a plain reading and interpretation of the Federal Rules of Civil Procedure.⁴¹ The court bluntly, but appropriately, stated that the amended complaint would have replaced the original complaint “lock, stock, and barrel” as a matter of right under Rule 15(a).⁴² The First Circuit also correctly determined that the district court should have examined federal question jurisdiction because the amended complaint dropped diversity as a basis for the action.⁴³ The court undertook a conventional application of the Federal Rules of Civil Procedure and came to the logical conclusion that federal-question jurisdiction applied, as set forth in the amended complaint.⁴⁴

The First Circuit adequately addressed the time-of-filing rule, concluding that the district court misconceived its reach.⁴⁵ The justification for the rule in the diversity of citizenship context is absent in ordinary federal-question cases.⁴⁶ A straightforward reading of *Grupo Dataflux* does not suggest the extension of the time-of-filing rule to a federal question case, and the First Circuit correctly interpreted *Grupo Dataflux* as restricting the rule to diversity cases.⁴⁷ The First Circuit was true to the letter and spirit of the rule, and its refusal to apply it broke no new ground.⁴⁸

The First Circuit noted the likelihood of a different outcome if ConnectU had failed to amend its complaint as of right.⁴⁹ When confronted with a motion

40. See *id.* at 85 (identifying issue as question of first impression).

41. See *supra* note 2 (describing Rule 15(a)).

42. 522 F.3d at 91; see *Kolling v. Am. Power Conversion Corp.*, 347 F.3d 11, 16 (1st Cir. 2003) (holding once original complaint superseded by amended one, it no longer performs any function); *InterGen N.V. v. Grina*, 344 F.3d 134, 145 (1st Cir. 2003) (declaring amended complaint supersedes original complaint); see also *WRIGHT ET AL.*, *supra* note 18, § 1476 (describing effect of amended pleading).

43. See *Matthew C. Harper-Nixon*, *supra* note 8, at 36 (discussing holding of First Circuit).

44. See 522 F.3d at 91 (holding amended complaint, effective as of right, replaced original, transforming case into federal-question case); see also *Vairo*, *supra* note 4 (describing First Circuit’s explanation as on “firm footing”).

45. *Zupanec*, *supra* note 21, at 5 (describing First Circuit’s time-of-filing discussion).

46. See 522 F.3d at 93 (explaining policy decision behind time-of-filing rule). “[The] rule is the product of a policy decision that aims to promote certainty in diversity cases while at the same time minimizing the risk of unwholesome strategic behavior arising from the temptation to manufacture diversity” *Id.*; see also *New Rock Asset Partners, L.P. v. Preferred Entity Advancements, Inc.*, 101 F.3d 1492, 1503 (3d Cir. 1996) (explaining letter and spirit of rule apply most clearly to diversity cases); *supra* note 33 (discussing policy concerns for rule).

47. See *Grupo Dataflux v. Atlas Global Group*, 541 U.S. 567, 571 (2004) (limiting time-of-filing rule to diversity cases). In *Grupo Dataflux*, the Court held that the time of filing rule “measures all challenges to subject-matter jurisdiction *premised upon diversity of citizenship* against the state of facts that existed at the time-of-filing—whether the challenge be brought shortly after filing, after the trial, or even for the first time on appeal.” *Id.* (emphasis added); see also *Siegel*, *supra* note 20, at 2 (describing federal claim as “[b]eyond the reach of *Grupo*”).

48. See *New Rock Asset Partners v. Preferred Entity Advancements, Inc.*, 101 F.3d 1492, 1503-04 (3d Cir. 1996) (indicating courts do not hesitate to abandon time-of-filing rule where appropriate).

49. See 522 F.3d at 96 (discussing salient differences between motion for leave to amend and amendment as of right); see also *supra* note 18 and accompanying text (explaining difference between two types of amendments).

for leave to file an amended complaint, courts should consider threshold jurisdictional concerns before ruling on the motion.⁵⁰ The First Circuit correctly distinguished the situation at hand.⁵¹ Although the original complaint did not provide a solid basis for jurisdiction, ConnectU amended its complaint as of right before any challenge had surfaced.⁵² The First Circuit, therefore, logically decided to give the amended pleading effect because a jurisdictional inquiry did not occur before ConnectU filed the amended complaint.⁵³ The court's decision is a reminder for practitioners to pay attention and respond to complaints sooner rather than later, as a party that succeeds in amending a complaint as of right may properly supplant the basis for jurisdiction, but a party that has to ask leave to amend may not.⁵⁴

In *ConnectU L.L.C. v. Zuckerberg*, the First Circuit considered whether a civil litigant could amend its complaint as of right and switch the basis for federal jurisdiction before the opposing party mounted a jurisdictional challenge. The court held that the amended complaint superseded the original complaint and constituted a viable hook for federal jurisdiction. In reaching this conclusion, the First Circuit adhered to Rule 15(a) of the Federal Rules of Civil Procedure. The court distinguished this case from others that forbid plaintiffs from retroactively repairing jurisdictional flaws. The odd practical result of the case is that a party can switch the jurisdictional basis of its case depending on the opposing party's action or inaction in filing a responsive pleading—not on whether the court actually had jurisdiction in the original complaint. Nonetheless, faced with a matter of first impression, the First Circuit did not stray from a conventional application of precedent and procedure and properly reversed the district court's decision.

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50. See *Integrated Tech. & Dev., Inc. v. Rosenfield*, 103 F. Supp. 2d 574, 578 (E.D.N.Y. 2000) (noting court precluded from granting leave to amend if subject-matter jurisdiction lacking in original).

51. See 522 F.3d at 96 (noting “salient differences” between motion for leave to amend and amendment).

52. See *id.* (stating judge's authority over the case had not been brought to bear).

53. See Zupanec, *supra* note 21, at 5 (discussing court's decision).

54. See Vairo, *supra* note 4 (discussing use and importance of case and filing amended complaints as of right for practitioners).