

CIVIL Procedure

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A. Subject Matter Jurisdiction - State v. Federal

- a. Federal Question Jurisdiction
 - i. "arises under" federal law
 - 1) 28 U.S.C. s. 1331
 - ii. "Well-pleaded complaint" Rule
 - 1) Not enough for P to allege anticipated defenses and assert that the defense is invalidated by federal law
- b. Diversity Jurisdiction
 - i. 28 U.S.C. s. 1332(a)
 - 1) citizens of different States
 - 2) a citizen of a State and an alien
 - 3) plain vanilla diversity (as in (1)) plus extra alien(s) on either side
 - ii. Citizenship of Individual
 - 1) U.S. Citizen + state domicile
 - iii. *Gordon* Domicile Test
 - 1) Physical presence in the state + Intent to Remain Indefinitely
 - 2) Can only have **ONE** domicile at one time
 - iv. Complete Diversity
 - 1) ALL Ps diverse from ALL Ds
 - 2) Under 1332(a)(2), may **not** have alien on both sides
 - 3) Under 1332(a)(3), may have alien on both sides
 - v. Corporate Citizenship
 - 1) 28 U.S.C. s. 1332(c)(1)
 - a) Where Incorporated **AND**
 - b) Principal Place of Business (ppb)

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2) *Hertz Corp. v. Friend*

a) "Nerve Center" test --> HQ

vi. Amount in Controversy

1) Must **EXCEED** \$75k

a) Good faith allegation accept unless *LEGALLY CERTAIN* that award would never surpass \$75k

b) Only looks to P's claims, not D's counterclaims

c) Determined from evidence at time of filing

2) Non-Monetary Relief Requested

a) Either viewpoint- ****majority rule****

i) Looks at either parties' value for P's claim

ii) If either party has >\$75k "at stake"

3) Rules of Aggregation

a) Single P may aggregate all claims against single D

b) 2+ Ps may **NOT** aggregate claims unless they are for a "common undivided" interest

c) Single P may **NOT** aggregate claims against 2+ Ds unless they are for a "common undivided" interest

c. Removal

i. Who?

1) Defendant

ii. When?

1) W/in 30 days of original service

2) P can remand w/in 30 days of notice for procedural issue, or at anytime for SMJ issue

3) If P could have filed in federal ct. originally

iii. Where?

1) File in federal ct. w/notice to other

- 1) FILE IN FEDERAL CT. w/ NOTICE TO OTHER parties & state ct.
- iv. How?
 - 1) D files w/reasoning
 - 2) P cannot amend complaint to get rid of SMJ
- v. No AIC claimed?
 - 1) D must prove by preponderance of evidence
- vi. Special Rules
 - 1) DIVERSITY
 - a) If originally filed in D's state of citizenship, cannot be removed
 - b) Can only be removed w/in ONE YEAR of original complaint being filed
 - 2) **30 DAYS** to file removal begins at 1st chance of federal ct. having jurisdiction
 - 3) Multiple Defendants
 - a) ALL Ds must consent
- vii. 28 U.S.C. s. 1441, 46, 47

B. Personal Jurisdiction - geographical

- a. Long-Arm Statutes
 - i. Fits in categories of state statute?
 - ii. "Up to the Limits of Constitution"
- b. General - "at home"
 - i. Individual
 - 1) Domicile
 - 2) Personal Service w/in State
 - ii. Corporation
 - 1) Inc.
 - 2) PPB
 - 3) Continuous & Systematic Affiliations

- iii. In rem or quasi in rem
 - 1) Must satisfy minimum contacts test

c. Specific

i. Minimum Contracts

- 1) Nature & Quality of contacts
 - a) Purposeful, substantial, foreseeable
 - b) NOT passive, isolated, casual
- 2) Nexus btwn contacts & CoA
 - a) Is CoA or complaint related to D's contacts with the state?
- 3) Reasonableness factors
 - a) Burden on D
 - b) State's interest
 - c) P's interest in convenient litigation

ii. Stream of Commerce

- 1) *Asahi*
 - a) O'Connor - purposeful contacts needed
 - b) Brennan - foreseeable contacts b/c **regular, anticipated** flow of product into state
 - c) Stevens - reasonableness considering volume, value, and hazardous nature of product entering state

iii. Internet

- 1) Nature & Quality of contacts
 - a) Purposefulness - Did online source purposely contact customers in forum state?
 - b) Foreseeability - Could company predict that a lawsuit might arise in forum state b/c of number of people online source affects?
 - c) Control - Did online source have control over contacts in forum state?

C. Venue - narrower district

a. Venue Statute

- i. 28 U.S.C. s. 1391
 - 1) Residency of D
 - a) Any district that a D is resident (if all Ds reside in same state)
 - b) Individual = domicile
 - c) Corp = anywhere subject to PJ
 - d) Alien or US citizen overseas = any district
 - 2) Substantial part of claim arises in
 - 3) If no venue from 1 or 2, any district where one of Ds subject to PJ

b. Transfers & Dismissals

- i. 28 U.S.C. s. 1404
 - 1) Original venue is proper, but there's a better one
 - 2) Same body of law used
- ii. 28 U.S.C. s. 1406
 - 1) Original venue is improper, new one is proper
 - 2) New body of law
- iii. Forum Non Conveniens
 - 1) Case dismissed
 - 2) Venue is proper, but there is a more convenient forum

D. Notice

a. Service of Process

- i. Fed. R. Civ. P. 4(a-e)
 - 1) Personal Service
 - 2) Last known address w/ competent person of age
 - 3) Mail
 - 4) Newspaper
 - a) LAST resort
 - b) After all Due Diligence exhausted

BY ALL OR DUE DILIGENCE EXHAUSTED
*For companies, notice given to managing or
general agent or any agent authorized by
appt. of law to receive notice.

E. Complaint

- a. Basic Notice Pleading
 - i. Rule 7
 - 1) Pleadings allowed; Forms of motions and other papers
 - ii. Rule 8(a)
 - 1) What **must** be included in complaint:
 - a) SMJ grounds
 - b) Short & plain statement of claim showing pleader is entitled to relief
 - c) Demand for relief sought
- b. Plausible Pleading: A New Standard
 - i. *Twombly*
 - 1) Factual allegations assumed to be true
 - 2) Legal conclusions must be **plausible**, not just conceivable to survive a motion to dismiss for failure to state a claim
 - a) Look at facts to determine plausibility
 - ii. *Iqbal*
 - 1) If there is more than one possible conclusion, then the P's legal conclusion is not plausible
 - 2) Legal elements and conclusions are not assumed to be true, just facts

F. Responding to the Complaint

- a. Default
 - i. Not responding to a complaint
 - ii. Waive all defenses, except lack of PJ - collateral attack (if not already argued)

b. Motion to Dismiss

i. Rule 12(b)

- 1) Lack of SMJ
- 2) Lack of PJ
- 3) Improper Venue
- 4) Insufficient process (Document was wrong)
- 5) Insufficient service of process (Bad/No Choice)
- 6) Failure to state a claim upon which relief can be granted (Plausibility standard requirement)
- 7) Failure to join a party under Rule 19
 - Timeline = same as answer
 - ◆ 21 days after being served unless D waived service, which gives him 60 days

c. Other Rule 12 Motions

i. Rule 12 (f)

- 1) Court will strike any insufficient defense or redundant, immaterial, impertinent, or scandalous matter
- 2) Will be denied unless it can be shown that no evidence in support of allegation would be admissible

1) Rule 12(e)

- 1) Court must decide if pleading is so vague or ambiguous that the party cannot prepare a response

2) Rule 12(g)

- 1) Only allowed to file on pre-answer motion and can put any and all objections into this one motion (Disfavored defenses must be included)

d. Waiving and Preserving Defenses

i. Rule 12(h)

- 1) Defenses in 12(b)(2)-(5) must be brought up in 1st responsive pleading, or they are waived (**DISFAVORED DEFENSES**)
 - a) *Hunter* - D cannot reserve his right

- a) *Waiver* - D CANNOT RESERVE HIS RIGHT to these defenses in 1st responsive pleading, must object to each one in that pleading to avoid them being waived
- 2) Defenses in 12(b)(1),(6),(7) can be brought up later w/o being waived (must be brought up in different motion though)
- 3) Rule 12(h)(B)(ii) - Objection must be included in responsive pleading or amendment as a matter of course
 - a) Rule 15: Matter of Course = 21 days after serving
 - b) If objection not included in 1st responsive pleading, but included in amended pleading before 21 day mark, **NOT** waived
 - c) If objection is added to amended pleading after 21 day mark, objection had been waived
- 4) Notices of Removal are not responsive pleadings, so do not need to include objections there

e. Answer

i. Rule 8(b)

- 1) Requirements
 - a) Assert any affirmative defenses
 - b) Assert any counterclaims or claims against another D that are compulsory
 - c) Respond to each allegation in short and plain terms (Deny, admit, or lack of sufficient knowledge)
- 2) D must be specific when denying only part of an allegation (Unless they use remainder language)
- 3) D does not have to be specific about admitting to part of an allegation, but if not specific, he risks admitting too much
- 4) Failing to respond to an allegation = it is admitted

- admitted
- 5) Seeing a piece of evidence that says an allegation is true does not force D to admit allegation is true
- ii. Rule 8(c)(1) = Affirmative defenses
- 1) When examining sufficiency a court will look at:
 - a) Whether the matter was appropriately pled as an affirmative defense
 - b) Whether the defense is adequately pled under Rule 8 & 9
 - c) Whether sufficiency is pursuant to standard identical to 12(b)(6) (Plausibility standard)
 - 2) D cannot surprise P w/unexpected defense, but must plead such defense timely, so P can argue against it
 - 3) Can be brought up in amended answers, and can also be brought up during trial if there is a good faith reason w/o prejudice to P

G. Ethical Considerations

- a. Rule 11: Care & Candor
- i. Every document filed w/ court must be signed by at least 1 attorney or by a pro se party to say that the appropriate amount of research and care went into this document
 - ii. Rule 11(b) - requires reasonable inquiry under the circumstances to determine if suit is meritorious and attorney's signature state:
 - 1) This is not for improper purpose
 - 2) Any legal claims, defenses, or contentions are warranted
 - 3) Factual contentions have evidentiary support or will likely have evidentiary support after reasonable opportunity for further investigation or discovery (If no evidence at the time must say "Upon

evidence at the time must say (upon information & belief)

- 4) Denials of factual contentions are warranted on evidence or are reasonably based on belief or lack of info

b. Procedure for Rule 11 Sanctions

i. By Opposing Counsel

- 1) Allowed 21 days to amend complaint before bringing before the court

ii. By Judge

- 1) No time to amend, just have to defend yourself

H. Amendments to Pleadings

a. Pretrial Amendments

i. Rule 15

- 1) Any attorney can amend pleading w/o permission if:
 - a) It's w/in 21 days after pleading was served; **OR**
 - b) Pleading requires responsive pleading:
 - i) 21 days after service of responsive pleading; **OR**
 - ii) 21 days after service of motion under rule 12(b), (e), or (f)
*whichever is earlier
- 2) All other amendments must have court's permission or consent of opposing party
 - a) Consent of the court given when justice so requires (liberal standard)

b. Amendments after Expiration of the Limitations Period: Relation Back

i. Rule 15(c)

- 1) Amendment to pleading relates back to date of original pleading when:
 - a) Law provides that applicable statute of limitations allows relation back;

OR IMITATIONS ALLOWS RETALIATION BACK,

AND

- b) Asserts claim or defense that arose out of same conduct, transaction, or occurrence as original pleading; **OR**
- c) Changes party or naming of party against whom a claim is asserted if 15(c)(1)(B) is satisfied and if w/in period provided by Rule 4(m) for serving summons and complaint, party to be brought in by amendment:
 - i) Received such notice of action that it will not be prejudiced in defending merits; **AND**
 - ii) Knew or should have known that the action would have been brought against it, but for a mistake concerning proper party's identity

I. Joinder of Claims and Parties

a. By Plaintiffs

- i. Rule 18* (applies to any party)
 - 1) A party asserting a claim, counterclaim, crossclaim, or 3rd party claim **may** join, as independent or alternative claims, as many claims as it has against an opposing party
 - a) Does not have to be under one complaint
- ii. Rule 20(a)(1) - A person **may** join as a P in an action if:
 - 1) They assert any right to relief jointly, severally, or in the alternative in respect of or arising out of same transaction, occurrence, or series of transactions or occurrences; **AND**
 - 2) Any question of law or fact common to all Ps will arise in the action

iii. Rule 20(a)(2) - A person **may** be joined as a D in an action if:

- 1) Any right to relief is asserted against them jointly, severally, or in the alternative with respect to or arising out of same transaction, occurrence, or series of transactions or occurrences;
AND
- 2) Any question of law or fact common to all Ds will arise in the action

b. By Defending Parties

i. Counterclaims

- 1) Rule 13(a) - **Compulsory** (*must* assert or waive)
 - a) Arises out of transaction or occurrence that is subject matter of opposing party's claim; **AND**
 - b) Does not require adding another party over whom court cannot acquire jurisdiction
- 2) Same transaction or occurrence if YES to any of the following ?s:
 - a) Issues of fact and law raised by claim and counterclaim largely the same?
 - b) Would *res judicata* bar a subsequent suit on D's claim absent compulsory counterclaim rule?
 - c) Substantially same evidence support or refute P's claim and D's counterclaim?
 - d) Logical relation btwn claim and counterclaim based on facts not legal theories?
- 3) 13(a) counterclaims use original claim's SMJ
- 4) Rule 13(b) - **Permissive** (**may** assert)
 - a) If not compulsory, need own basis for SMJ (or Supp. Jurisdiction)

ii. Crossclaims

1) Rule 13 (g)

a) A crossclaim **may** be stated by one party against a co-party if claim arises out of same transaction or occurrence as original action

i) All crossclaims are permissive
(Need own basis for SMJ)

2) Rule 13(h)

a) Following Rules 19 & 20, a D **may** add a person as a party to an already existing counterclaim and crossclaim

iii. Impleader Claims

1) Rule 14(a)(1) - a D **may**, as a 3rd party P, serve a summons and complaint on a nonparty who is or may be liable to it for all or part of the claim against it
(Derivative Liability)

a) 3rd party P must get permission by motion if 3rd party complaint filed 14 days after serving original answer

b) Rule 14 is **permissive**

c) 3rd party Ds can only be found liable if original D is found liable to P

2) Rule 14(a)(2)

a) 3rd party D **may** file crossclaims, counterclaims against 3rd party P, defenses against P & 3rd party P, and any claims against P arising out of same transaction or occurrence as P's original claim

3) Rule 14(a)(3)

a) P **may** file any claim against a 3rd party D once he is added to suit as long as claim arises out of same transaction or occurrence as P's original claim

J. Supplemental Jurisdiction

- a. Statutory Approach
 - i. 28 U.S.C. 1367
 - a) Except as provided in (b) and (c) any civil action where district ct. has original jurisdiction, district ct. shall have supplemental jurisdiction over all claims that are so related that they form part of **same case or controversy**
 - b) When district ct. has jurisdiction solely based on *diversity*, the ct. shall not have supplemental jurisdiction over claims by **Ps** against persons made parties under Rule 14, 19, 20, or 24...
 - c) District ct. **may** decline to exercise supplemental jurisdiction over a claim under (a) if:
 - a) Claim raises a novel or complex issue of state law
 - b) Claim substantially predominates over claim or claims which ct. has original jurisdiction
 - c) District ct. has dismissed all claims over which it has original jurisdiction, **OR**
 - d) In exceptional circumstances, there are other compelling reasons for declining jurisdiction
 - ii. Will exist for counterclaims and crossclaims most of the time b/c D hauled into ct. and usually claims are integral to case at hand

K. Discovery

- a. Scope
 - i. Party controlled (lawyers decide what is exchanged)
 - ii. Rule 26(b)(1)
 - a) Parties may obtain discovery regarding

- a) Parties may obtain discovery regarding any **nonprivileged matter** that is relevant to any parties' claim or defense
 - a) Relevant info does not need to be admissible at trial if the discovery appears reasonably calculated to lead to discovery of admissible evidence

iii. Rule 26(b)(2) - Limitations

- a) Privileged matter is off limits
- b) Attorney-Client privilege:
 - a) Conversation btwn attorney & client
 - i) About legal advice or in pursuit of legal services
 - ii) If conversation told to 3rd party, privilege waived
 - b) Work Product protected from discovery unless:
 - i) Materials otherwise discoverable under 26(b)(1);
AND
 - ii) Party shows substantial need for materials to prepare its case and cannot, w/o undue hardship, obtain their substantial equivalent by other means
- c) When attorney holds something back b/c of work product doctrine, **must** disclose what has been w/held to other party
 - i) So other side has chance to challenge assertion of work product doctrine
- d) If attorney gives other party privileged materials inadvertently, may request it back and other side **must** return it (Claw Back Rule)
- e) Pending motion to dismiss, only required to produce mandatory documents that would help other party argue motion

b. Tools

- i. Initial Disclosures (Rule 26(a)(1))
- ii. Traditional Disclosures:
 - a) Interrogatories
 - b) Document Request
 - c) Depositions
 - d) Request for Admissions
 - e) Rule 35 (mental or physical examination of party)

L. Disposition w/o Trial

a. Summary Judgment

- i. Rule 56 - Court shall grant motion for summary judgment if movant shows there is no genuine dispute as to any **material fact** and movant entitled to JMOL
 - a) Dispute about a nonmaterial fact not enough to deny summary judgment
 - b) Must file summary judgment before 30 days after close of discovery
 - c) P has burden of proof (production)

M. Second Guessing the Jury

a. JMOL

- i. Cannot make motion for JMOL if evidence does not surpass burden of persuasion
- ii. Rule 50(a) - Directed Verdict
 - a) Made before jury deliberates
- iii. Rule 50(b) - JNOV
 - a) Renew motion after jury verdict
 - b) Must be on same grounds as 50(a)

N. Preclusion

a. Claim Preclusion (*Res Judicata*)

i. Same Claim

a) Transactional Test (**MOTS**)

- 1) Motivation
- 2) Origin
- 3) Time
- 4) Space

b) "group of operative facts"

c) Convenient trial unit (logical relationship btwn claims)

ii. Final Judgment on Merits

a) Whether parties had opportunity to argue claims previously

b) Examples:

- 1) Jury verdict
- 2) JMOL
- 3) Summary judgment
- 4) Dismiss for failure to follow discovery rules
- 5) Dismiss for failure to state claim

c) **Non**-examples:

- 1) Settlement w/stipulation of dismissal
- 2) Lack of PJ
- 3) Improper venue
- 4) Lack of SMJ

iii. Same Parties

a) Legal relationships that create "same parties"

- 1) Successive owners of property
- 2) Fiduciaries
 - i) Trustee
 - ii) Guardian
 - iii) Executor/Administrator
- 3) Class Representatives

b) Ways to analyze relationship

- 1) Alignment of interest btwn rep & represented party

represented party

- 2) Does rep know they are representing someone(s)?
- 3) Does represented party know that someone is representing them?

iv. Other Considerations

- a) When determining preclusion, look to law of rendering court (1st decision)
- b) *MAJORITY* When 1st judgment is complete on trial level (even if pending on appeal), there is a **final judgment on merits**.
 - 1) Most courts will delay decision on preclusion until appeal is decided on.

b. Issue Preclusion (*Collateral Estoppel*)

i. Same issue

- a) Example
 - 1) Guilty of criminal A&B --> liable for civil A&B
- b) **Non**-examples
 - 1) Acquitted of criminal A&B --> COULD still be liable in civil case
 - 2) Liable for A&B --> NOT necessarily guilty in criminal case

ii. Actually litigated

- a) Examples:
 - 1) Jury verdict
 - 2) Evidentiary hearing
 - 3) 12(b)(6) motion
 - 4) Summary judgment
 - 5) JMOL
- b) **Non**-examples:
 - 1) Stipulation
 - 2) Admission
 - 3) **Default judgment**

iii. Actually decided

- a) Must clearly state position on issue
 - 1) Sometimes unclear in jury verdict

- iv. Essential to judgment
 - a) Restatement (Second)
 - 1) When judgment based upon alternative, independent grounds, neither ground considered essential to judgment unless judgment is appealed and:
 - i) Ct. of appeals upholds all grounds (all "essential")
 - ii) Ct. upholds one ground, but reverses other (affirmed ground is "essential")
 - iii) Ct. upholds one ground but fails to consider other ground (affirmed ground is "essential")
- v. Same parties?
 - a) Mutuality - must be exactly same parties
 - b) Non-Mutuality
 - 1) 1st judgment determines issue against a party
 - 2) A new party may assert issue preclusion on that issue against the same party from 1st suit

c. Non-Mutual Collateral Estoppel

- i. Defensive
 - a) Follows same as mutual collateral estoppel
- ii. Offensive
 - a) A trial judge should not allow the use of offensive collateral estoppel in cases where a P could easily have joined in the earlier action **OR**
 - b) Where the application would be unfair to a D for the following (or other) reasons:
 - 1) D had little incentive to defend vigorously in the 1st lawsuit, particularly if future suits are not foreseeable.

FORESEEABLE.

- 2) 1st judgment is inconsistent with one or more previous judgments in favor of D
- 3) 2nd action affords D procedural opportunities unavailable in the 1st action that could have readily caused a different result