LexisNexis Capsule Summary
Civil Procedure

Chapter 1
STATE AND FEDERAL COURT SYSTEMS

§ 1.01 Federal Judicial System

(1) ***Federal district courts*** are courts of original jurisdiction. District courts, like all federal courts, are also courts of limited subject matter jurisdiction, in that statutes authorize them to hear only certain kinds of cases, namely those based on federal questions or diversity of parties.

(2) ***Circuit Courts*** are courts of appellate jurisdiction as they are authorized only to review decisions on appeal from district courts, certain specialized federal courts or federal administrative agencies. There are thirteen federal circuit courts; twelve for each one of the geographic circuits and one designated as the Federal Circuit which hears appeals from various specialized federal courts. Appeals from many of the administrative agencies go to the Court of Appeals for the D.C. Circuit.

(3) ***United States Supreme Court*** has original jurisdiction over cases affecting ambassadors and in which states are parties. Its appellate jurisdiction over all other types of cases is largely discretionary. The Court's rules list the following factors as relevant in granting *certiorari*:

- inter-circuit conflicts
- conflicts between the courts of appeals and state courts of last resort
- interstate conflicts on federal questions
- conflicts with Supreme Court decisions on federal questions
- important and unsettled federal questions
- Other federal rulings calling for the exercise of the Supreme Court's power of supervision.

§ 1.02 State Judicial Systems

State judicial systems typically include:

(1) A ***variety of courts of limited subject matter jurisdiction,*** authorized to hear specific types of cases, e.g., traffic, landlord-tenant, small claims or probate.

(2) A ***court of original and general jurisdiction*** that hears all claims not exclusively vested in courts of limited jurisdiction, such as state claims and nonexclusive federal question claims that also could have been brought in federal district courts. State courts of general jurisdiction often exist at the county level. Such courts vary in their designations, e.g., Superior Court in the District of Columbia, Circuit Court in Virginia, and Supreme Court in New York.

In some states courts of general jurisdiction also possess appellate jurisdiction over cases originally tried in courts of limited jurisdiction. Appellate review in such cases is *de novo*; little or no deference is paid the lower court decision because of restrictions on its jurisdiction and, in many cases, on its procedures.

(3) An ***intermediate appellate layer***, generally available only in more populous states. In some jurisdictions, the decision of the intermediate appellate court is final for the most fact-bound and routine kinds of cases, such as domestic relations and non-capital criminal cases, subject perhaps to discretionary appeal for constitutional questions.

(4) A ***court of appellate jurisdiction***, variously called the Supreme Court, the Court of Appeals, or, in Massachusetts, the Supreme Judicial Court. Where a state provides for an intermediate appellate court, the existence of such allows the highest state court to exercise considerable discretion in selecting cases for further review. Appeal from the intermediate appellate court to the highest court is predominantly by permission, with exceptions for a small number of important cases selected by the legislatures, such as administrative law cases involving governmental parties or capital criminal cases.

Finally, the United States Supreme Court has the authority to review state court rulings on the meaning and application of federal law, although in practice the Court seldom exercises this authority.

§ 1.03 Selecting the Court in Which to Bring Suit

The following factors influence the parties' choice of forum for litigating a given matter:

(1) there must be sufficient contacts between the defendant and the forum state to exercise ***personal jurisdiction*** over the defendant (see Chapter 2);

(2) the court must possess ***subject matter jurisdiction*** over the controversy (see Chapter 4);

(3) where a case is originally brought in state court but may be subject to the jurisdiction of the federal court as well, the defendant will consider opportunities for ***removal to federal court*** (see Chapter 2);

(4) concerns of judicial efficiency and convenience of parties and witnesses will influence the appropriate ***venue*** within a specific court system in which to try the case (see Chapter 5);

(5) various ***tactical factors*** such as: reputation of judges presiding in specific courts, court calendars, and procedural differences influencing, for example, availability

of a jury trial, required level of agreement for verdicts, applicable rules of evidence or availability of appellate review (see Chapters 12, 13);

(6) client characteristics;

(7) where suit can be brought in more than one jurisdiction, differences in ***substantive law*** will be evaluated so that the law most favorable to a party's claim may be applied (see Chapter 6).

Chapter 2
PERSONAL JURISDICTION

§ 2.01 Personal Jurisdiction Based on Citizenship, Consent and Waiver

[1] Suit in the Defendant's Home State

A defendant is subject to the personal jurisdiction of his/her/its ***home state.*** "Home state" may be defined:

(1) for ***individuals*** by ***residence, citizenship and domicile.*** In *Milliken v. Meyer,* 311 U.S 457 (1940), the Supreme Court upheld the validity of personal jurisdiction based on domicile even though the defendant was absent from the state at the time.

(2) for ***corporations*** by the ***state of incorporation*** or where the corporation conducts its ***principal operations.***

[2] Consent

A defendant may consent to the court's personal jurisdiction in advance of suit, and such consent, if expressly made, functions to cure any jurisdictional defects that might otherwise exist. Examples of express consent include:

(1) forum-selection clauses in contracts [*see Carnival Cruise Lines, Inc. v. Shute,* 499 U.S. 585 (1991), in which the Court upheld a clause printed on the back of the plaintiff's steamship ticket]; and

(2) consent documents filed by foreign corporations with state authorities as a condition for doing business in the forum.

[3] Waiver

When a nonresident defendant objects to a state's personal jurisdiction over him/her on due process grounds, he/she must preserve such objection or risk waiving it. Waiver need not be express. It is enough that a party act in a way which is incompatible with the party's argument that the forum lacks a basis for asserting personal jurisdiction over him/her.

Defendant will waive his/her challenge to personal jurisdiction if he/she either fails to include it in a motion to dismiss made on other grounds, or fails to otherwise raise the matter by motion or pleading.

Today, most states, as well as the federal system, no longer require a defendant to make a special appearance for the purpose of contesting jurisdiction, separate and apart from any

other grounds on the merits of the case. Defendant does not prejudice his/her motion to dismiss by joining with it other grounds for dismissal.

§ 2.02 When Parties Cannot be Served Within the Forum State

In the seminal case of *Pennoyer v. Neff,* 95 U.S. 714 (1877), the Supreme Court held that ***due process prevented suit against nonresident defendants who could only be found and served elsewhere.***

Pennoyer involved a default judgment entered by an Oregon state court against Neff for attorney's fees. Neff was neither a citizen of Oregon nor had he been served there, although he did own property in the state. Neff's Oregon property was seized and sold by the sheriff to Pennoyer in order to satisfy the judgment. Subsequently, Neff sued Pennoyer in federal court for recovery of his property.

Concluding that Oregon could not exercise personal jurisdiction over Neff in an action to determine personal liability, the Court invalidated the default judgment and resulting sheriff's sale. The Court held that if a state court attempts to exercise personal jurisdiction over a defendant, the defendant "***must be brought within its jurisdiction by service of process within the State, or his voluntary appearance***."

§ 2.03 Minimum Contacts with Forum State

[1] *International Shoe*

In ***International Shoe Co. v. Washington,*** 326 U.S. 310 (1945), the Supreme Court articulated a new test of determining whether personal jurisdiction exists over a nonresident defendant who cannot be found and served within the forum state: whether ***the defendant has certain minimum contacts with the forum state,*** such that the maintenance of the suit does not offend '***traditional notions of fair play and substantial justice.***' "

The facts of *International Shoe* are as follows: International Shoe Company was incorporated in Delaware and had its principal place of business in Missouri. The company employed Washington residents to solicit orders there, who reported directly to the company's main office in Missouri. The state of Washington sued International Shoe to collect unemployment compensation tax upon salaries defendant had paid to its Washington employees, and International Shoe challenged personal jurisdiction in Washington. The Supreme Court affirmed Washington's exercise of personal jurisdiction over International Shoe, finding sufficient contacts with the state to do so.

International Shoe identified ***two types of contacts*** a nonresident defendant could have with the forum:

(1) those related to the controversy (specific jurisdiction); and

(2) those unrelated to the controversy that are of such a nature as to justify suit against defendant in the current controversy (general jurisdiction).

[2] Contacts Related to the Controversy

[a] Single or Isolated Activities

In *International Shoe*, the Supreme Court noted that a corporation's "single or isolated items of activities in a state . . . are not enough to subject it to suit on causes of action *unconnected* with the activities there"; in *McGee v. International Life Ins. Co.,* 355 U.S. 220 (1957), the Court addressed the issue of whether a ***"single or isolated activities" related to the controversy*** could support personal jurisdiction. The Court answered in the affirmative.

McGee, as the beneficiary of her deceased son's life insurance policy, sued defendant International Life in California. Defendant was served by mail in Texas, its corporate home. International Life declined to appear in the case and plaintiff obtained a default judgment in California, which she attempted to enforce in Texas. International Life collaterally attacked the judgment, arguing that California did not have personal jurisdiction.

Despite the fact that the defendant conducted virtually no business in California, with the only California policy in force being the decedent's, the Court nonetheless held that California had validly exercised jurisdiction over the defendant. The Court emphasized the fact that the ***contract sued upon had a substantial connection to the forum state***, as well as ***California's strong interest in protecting its citizens***.

[b] Sufficient Related Contacts Found

Burger King Corp. v. Rudzewicz [471 U.S. 462 (1985)] demonstrated that not all of the defendant's contacts related to the controversy must be within the forum. Through negotiation with Burger King's regional office in Michigan, Rudzewicz and another Michigan defendant obtained a franchise in that state. Defendants failed to make payments, and Burger King brought a federal diversity suit on the franchise agreement in Florida, its headquarters and place of incorporation.

The Supreme Court concluded that personal jurisdiction over Rudzewicz was constitutional, ***finding that there were enough Florida contacts related to the controversy*** to satisfy the test. Defendants at times dealt directly with Burger King's Miami headquarters; they contracted with Burger King to have Florida law govern the franchise agreement; and they promised to send their franchise payments to Burger King's Florida address. Under the circumstances, the Court refused to attach importance to the fact that Rudzewicz had not been in the forum state.

[c] Insufficient Related Contacts Found

In *World-Wide Volkswagen v. Woodson*, 444 U.S. 286, 297 (1980), the Court further refined the minimum contacts test, stating that "critical to due process analysis . . . is that the defendant's conduct and connection with the forum State as such that he should ***reasonably anticipate being haled into court there***."

In this case, the plaintiffs purchased an Audi from defendant retailer Seaway Volkswagen in New York. Thereafter, while traveling across country in the automobile, they were involved in a collision in Oklahoma, and the gas tank ignited, seriously injuring the plaintiffs. Plaintiffs brought suit in an Oklahoma state court against manufacturer Audi, importer Volkswagen of America, World-Wide Volkswagen and Seaway.

Noting that the only connection of the defendants with Oklahoma was that an automobile sold in New York to New York residents became involved in an accident in Oklahoma, the Court held that ***Oklahoma courts were without minimum contacts necessary to assert personal jurisdiction***. Defendants did not sell cars, advertise, or carry on any other activity in the state. Thus, the Court reasoned that the conduct of the retailer and wholesaler was not such as to cause them to anticipate being sued in Oklahoma.

[3] Contacts Unrelated to the Controversy

When a non-resident defendant cannot be found and served within the forum, and when the cause of action arises outside of the forum, exercise of personal jurisdiction over the defendant requires contacts with the forum state that are ***"systematic and continuous."*** [*Perkins v. Benguet Consolidated Mining Co.*, 342 U.S. 437 (1952)]. Such standard was met in *Perkins*, an action arising out of out-of-state activities, where the defendant maintained an office and conducted business in the forum state. However, in *Helicopteros Nacionales de Columbia, S.A. v. Hall*, 466 U.S. 408 (1984), the mere fact that the nonresident defendant made regular purchases in the forum state was not held sufficient to justify personal jurisdiction in a case not related to such purchases.

[4] Combining Related and Unrelated Forum Contacts

Keeton v. Hustler Magazine, 465 U.S. 770 (1984), presented the situation where a nonresident defendant has contacts with the forum state that are both related and unrelated to the controversy. Keeton sued Hustler Magazine in federal court in New Hampshire for libel. Hustler Magazine had circulated in New Hampshire copies of the magazine alleged to have libeled plaintiff (related contacts), and it had circulated other issues there in a continuous and systematic fashion (unrelated contacts).

While there is some question whether either defendant's related or unrelated contacts would have alone been sufficient to support personal jurisdiction, the Court found that the aggregate of defendant's contacts with the forum were proved sufficient.

[5] "Notions of Fair Play and Substantial Justice"

In *Asahi Metal Industry Co. v. Superior Court,* 480 U.S. 102 (1987), the Court interpreted the standard from *International Shoe* that "maintenance of the suit does not offend '***traditional notions of fair play and substantial justice.***' "

The plaintiff sued in California over a serious accident there, allegedly caused by failure of the rear tire of plaintiff's motorcycle. The plaintiff sued the Taiwanese tire manufacturer, which to bring Asahi, a Japanese concern and manufacturer of the tire's valve assembly, into the case on a theory of indemnification.

The Court held that California's attempt to assert personal jurisdiction over the foreign defendant was ***unreasonable on balance***. The Court found the interests of the plaintiff and the forum state to be "slight," and Asahi's burden from defending in California "severe."

§ 2.04 State Long-Arm Statutes

In response to *International Shoe* and its progeny, most states have enacted ***long-arm statutes,*** authorizing out-of-state service on defendants who otherwise could not be served. Long-arm statutes vary greatly from state to state, but there are three basic types:

(1) conferring jurisdiction to the full extent permitted by the Fourteenth Amendment right to due process (sometimes called "blanket" or "limits of due process");

(2) listing specific instances under which the state can exercise jurisdiction (sometimes called "enumerated" or "laundry list"); and

(3) an intermediate type listing specific instances but authorizing court discretion in interpreting the instances.

§ 2.05 Transient Jurisdiction

Transient jurisdiction is based on ***service within the forum of a nonresident defendant*** passing through the state, and has been upheld by the Supreme Court in *Burnham v. Superior Court,* 495 U.S. 604 (1990).

§ 2.06 *Quasi In Rem* Jurisdiction

[1] General Rule

Quasi in rem jurisdiction is another method for exercising jurisdiction over a defendant, albeit in a limited manner, based on the defendant's property located within the forum. *Quasi in rem* jurisdiction can be used to adjudicate personal obligations, not merely rights

in the *res*. However, it binds the defendant only with respect to his interest in the *res* upon which jurisdiction is based, and thus, the value of a *quasi in rem* judgment cannot exceed the value of the *res*.

[2] Extension of Minimum Contacts Test to *Quasi in Rem Jurisdiction*

Quasi in rem jurisdiction has essentially become obsolete as a result of the Supreme Court's decision in *Shaffer v. Heitner,* 433 U.S. 186 (1977), in which it extended the minimum contacts test to *quasi in rem* cases.

In *Shaffer*, the plaintiff brought a shareholder derivative suit against officers and directors of the Greyhound Corp., a Delaware corporation, and its subsidiary, Greyhound, Inc. The defendants neither resided in Delaware nor were served there, and the alleged wrongful acts occurred outside Delaware. However, plaintiff asserted *quasi in rem* jurisdiction over the defendants, each of whom held stock in Greyhound, relying on a Delaware statute which conferred *quasi in rem* jurisdiction over stock issued by corporations chartered there. The Court found such grounds insufficient and stated that ***all assertions of state court jurisdiction must be based on "minimum contacts."*** The test was not satisfied here where the defendant's in-state property was "completely unrelated to the plaintiff's cause of action. Significantly, the Court held that ***"the presence of the property alone would not support the State's jurisdiction."***

In another *quasi in rem* case arising out of an automobile accident [*Rush v. Savchuk,* 444 U.S. 320 (1980)], the Court ***struck down the Seider doctrine*** which provided that service within the forum on a nonresident driver's insurer conferred *quasi in rem* jurisdiction, with the *res* being the insurer's duty to defend and indemnify the nonresident defendant. Exercise of jurisdiction over the defendant here was found to be was improper, as he had no other contacts with the forum state.

§ 2.07 *In Rem* Jurisdiction

Distinct from personal and *quasi in rem* jurisdiction – both of which support claims against a defendant for personal obligations – *in rem* jurisdiction focuses on property within the forum and can only be used to adjudicate claims regarding such property. *In rem* jurisdiction may also attach to "status" such as marital status in a divorce action.

§ 2.08 Jurisdictional Challenges

A defendant may challenge the court's personal jurisdiction in two ways:

[1] Direct Attack

A direct attack involves the defendant's participation in the lawsuit in order to attempt to prevent the court from reaching the merits of the case. The jurisdictional challenge may be joined with other arguments in support of dismissal. However, direct attack forces the

defendant to forfeit part of the protection secured by due process as he experiences the increased burden of defending in a distant and inconvenient forum as soon as he begins participating in the case.

[2] Collateral Attack

A defendant who objects to a court's personal jurisdiction over him/her and defaults in an action may subsequently bring a collateral attack against the judgment. However, if the defendant participated in the case without objecting to the court's personal jurisdiction, he/she cures any defect by waiver. If the defendant did challenge the court's personal jurisdiction in the first case, he/she is precluded from relitigating the question in the judgment-enforcement proceeding.

Chapter 3
NOTICE REQUIREMENTS

§ 3.01 Due Process

The Due Process Clauses (found in the Fifth Amendment and the Fourteenth Amendment) of the United States Constitution deny effect to adjudications unless the parties to be bound were given ***prior notice*** and an ***opportunity to participate.*** Notice that satisfies due process may be found from proper ***service of process*** or other recognized alternatives. *Process* usually consists of a summons directing defendant to respond or appear in court on penalty of default. *Service* is the formal means by which process is delivered to a defendant.

§ 3.02 Procedure for Service of Process

Rule 4 of the Federal Rules of Civil Procedure (FRCP 4) sets forth the methods for effectuating service in federal trials. Specific procedures are outlined for various parties: individuals, infants and incompetents, corporations and associations, foreign, federal, state and local governments, as well as individuals in foreign countries.

In federal actions, a plaintiff may serve process upon an individual, corporation or association by:

(1) delivering the summons and complaint to the individual personally;

(2) leaving the summons and complaint at the individual's dwelling house or usual place of abode with a person of suitable age and discretion then residing therein;

(3) delivering the summons and complaint to an agent authorized by appointment or by law to receive service of process.

However, FRCP 4(d)(2) provides incentives for a defendant to agree to waive formal service and instead accept service by mail. Upon notice of the commencement of the action and a request for waiver of service from the plaintiff, a defendant who so agrees is granted an extended time within which to answer – 60 days instead of the 20 days granted when process is formally served. FRCP 4 imposes upon the defendant "a duty to avoid unnecessary costs of serving the summons," and therefore, failure to accept process by mail subjects the defendant to liability for costs of service as well as attorney's fees incurred in any motion to collect the costs of service.

§ 3.03 Feasibility of Individual Notice

Alternative means of notice, such as newspaper publication, may satisfy due process where individual notice is impracticable and the party seeking to bypass individual notice can demonstrate that (1) the suit is in the interest of the absentees, (2) they will be

adequately represented by one before the court, and (3) the value of their individual interests is not too great. Where the identities and parties can be reasonably ascertained, however, individual notice is required. [*Mullane v. Central Hanover Bank & Trust Co.,* 339 U.S. 306 (1950)]

Chapter 4
SUBJECT MATTER JURISDICTION

§ 4.01 Subject Matter Jurisdiction

[1] Defined

Subject matter jurisdiction refers to a court's authority to decide a particular kind of controversy. Subject matter jurisdiction can be *concurrent* — shared between several different kinds of courts — or *exclusive,* restricted to a particular kind of court.

[2] Scope of Federal Subject Matter Jurisdiction

The United States Constitution sets out the permissible scope of the judicial power of federal courts in Article III, § 2. It lists the following types of federal subject matter jurisdiction:

- cases "arising under" the Constitution, laws of the United States, and treaties ***(federal question jurisdiction)***;
- cases affecting ambassadors and other official representatives of foreign sovereigns;
- admiralty and maritime cases;
- controversies to which the United States is a party;
- controversies between states and between a state and citizens of another state;
- cases between citizens of different states ***(diversity jurisdiction)***;
- cases between citizens of the same state claiming lands under grants of different states;
- cases between a state or its citizens and foreign states and their citizens or subjects (alienage jurisdiction).

Article III vests the Supreme Court with original jurisdiction of cases affecting ambassadors and other foreign officials and those to which a state is a party, and such appellate jurisdiction as Congress may create. Article III vests no jurisdiction directly in lower federal courts but authorizes Congress to create and endow them with subject matter jurisdiction. Congress has never vested lower federal courts with as much subject matter jurisdiction as Article III permits. Today, the main sources of federal jurisdiction are federal question jurisdiction and diversity jurisdiction, usually concurrent with state court jurisdiction.

§ 4.02 Federal Question Jurisdiction

In order to establish federal question jurisdiction, a "right or immunity created by the Constitution or the law of the United States must be an element, and an essential one, of the plaintiff's cause of action" [*Gully v. First National Bank*, 299 U.S 109, 112 (1936)]. Even where a cause of action arises under state law, a federal court may have jurisdiction

if it appears that the right to relief rests on the construction or application of a federal law [*Smith v. Kansas City Title & Trust Co.,* 255 U.S. 180 (1921)]. However, the mere presence of a federal issue in a state-created cause of action does not automatically confer federal question jurisdiction. Its availability depends in part on "an evaluation of the nature of the federal interest at stake": whether it is sufficiently important to require a federal trial forum [*Merrell Dow Pharmaceuticals, Inc. v. Thompson*, 478 U.S. 806 (1986)].

A plaintiff cannot invoke the original jurisdiction of the federal courts either by anticipating a federal defense or otherwise importing a federal question into his complaint that is not essential to his case.

§ 4.03 Diversity Jurisdiction

[1] General Rule

Under the federal diversity jurisdiction statute, 28 U.S.C. § 1332, a federal court has subject matter jurisdiction over a matter where:

(1) there is ***complete diversity*** among the parties such that no plaintiff shares citizenship with any defendant; and

(2) the ***amount in controversy exceeds $75,000***.

Limited exceptions to the complete diversity requirement apply where specifically created by Congress, e.g., in interpleader actions, only two adverse claimants need be of diverse citizenship. [28 U.S.C. § 1335(a)(1)]

[2] Limitations on Diversity Jurisdiction

Deferring to state courts, federal courts have traditionally ***declined to exercise jurisdiction*** in the following types of cases, even when the parties satisfy the requirements for diversity jurisdiction:

- certain *in rem* cases.
- probate cases.
- domestic relations cases.

Additionally, courts are obliged by statute to deny jurisdiction which has been "improperly or collusively made."

[3] Citizenship

Citizenship for diversity purposes requires a party to be a citizen of both the United States and of a state.

Individuals – The courts have equated the state citizenship of natural persons with ***domicile*** in a state. Domicile is created by the ***concurrent*** establishment of ***physical residence in a state and an intent to remain there indefinitely***. Although a person can have more than one residence at one time, he can have only one domicile at a time.

Corporations – The diversity statute deems a corporation to be the citizen of "any State by which it has been ***incorporated*** and of the state where it has its ***principal place of business***."

Unincorporated associations – Unincorporated associations, such as partnerships and labor unions, take the ***citizenship of each member.***

[4] Amount in Controversy

[a] "Legal Certainty Test"

The present amount in controversy is $75,000, exclusive of interest and costs. Jurisdictional amount is ordinarily computed from the plaintiff's viewpoint without regard to possible defenses, and plaintiff's good faith pleading controls unless the court concludes to "a legal certainty" that he cannot recover the pleaded amount.

[b] Aggregating Multiple Claims

Individual claims that do not alone satisfy the jurisdictional amount may be aggregated in the following circumstances:

- plaintiff asserts multiple claims ***against a single defendant,*** whether or not they are transactionally related.
- plaintiff joins ***several defendants*** to the same claim pursuant to FRCP 20 if the several defendants have a ***common undivided interest or title*** in the claim.
- ***several plaintiffs join in the same claim*** against one or more defendants pursuant to FRCP 20 when the several plaintiffs have a common undivided interest or title in the claim.

§ 4.05 Removal Jurisdiction

A ***defendant*** may, pursuant to 28 U.S.C. § 1441, remove a civil action pending in a state court to a federal court if the federal would have had ***original jurisdiction*** over the ***plaintiff's claim***. The assertion of a defense or counter-claim based on federal law does not convert a non-federal case into a federal one.

Diversity cases are removable only if none of the defendants is a citizen of the state in which the action is pending. [28 U.S.C. § 1441(b)]

When a federal court already has jurisdiction over a claim based on a ***federal question***, it has discretion to remove separate and independent state-law claims in order adjudicate

the entire case if the state law claim is ***part of the same constitutional case or controversy*** as the federal question claim. [28 U.S.C. § 1441(c)] If such test is met, the state law claim falls within the supplemental jurisdiction of the federal court and can thus be removed.

§ 4.06 Supplemental Jurisdiction

[1] General Rule and its Antecedents

When a federal court possesses subject matter jurisdiction over a matter, it may exercise supplemental jurisdiction over one or more related claims that would not independently satisfy subject matter jurisdictional requirements. Supplemental jurisdiction, a legislative creation since 1990 [28 U.S.C. § 1367], supplants two related judicial doctrines – *pendent* and *ancillary* jurisdiction.

[2] Pendent Jurisdiction

Pendent jurisdiction refers to the courts' extension of jurisdiction from a freestanding (usually federal question) claim to an otherwise jurisdictionally insufficient *pendent* (usually state law) claim by a ***plaintiff*** or plaintiffs.

[a] Pendent Claim Jurisdiction

In *United Mine Workers v. Gibbs* [383 U.S. 715 (1966)] Supreme Court was presented the question whether the federal courts had jurisdiction over the state claim in the absence of diversity. The Court held that constitutional power exists to decide the ***nonfederal claim*** whenever it is ***so related to the federal claim*** that they ***comprise "but one constitutional 'case.' "*** It suggested a three-part test for constitutional case:

(1) plaintiff must assert a federal claim that has "substance sufficient to confer subject matter jurisdiction on the court."

(2) freestanding and pendent claims "must derive from a ***common nucleus of operative fact***."

(3) the federal and nonfederal claims must be such that the plaintiff "would ordinarily be expected to try them all in one judicial proceeding."

[b] Pendent Party Jurisdiction

Pendent party jurisdiction was also relied upon to assert claims against new parties over whom independent federal subject matter jurisdiction was unavailable. In *Zahn v. International Paper Co.,* 414 U.S. 291 (1973), pendent party jurisdiction was invoked in a diversity action to add a defendant against whom the value of the claim was less than the jurisdictional amount. The Court found the exercise of pendent party jurisdiction to

be improper, suggesting that pendent party jurisdiction could not be used to avoid the rule against aggregation.

Pendent party jurisdiction was also invoked in federal question cases to add non-diverse parties to state law claims. In *Finley v. United State,* 490 U.S. 45 (1989), the plaintiff asserted a freestanding claim within the exclusive jurisdiction of the federal courts and sought to join transactionally-related state law claims against non-diverse defendants. Absent pendent party jurisdiction, plaintiff would have had to forego her state law claims against the non-diverse parties or to bring separate actions in federal and state court. The Court acknowledged the inefficiency and inconvenience of this result, yet denied pendent party jurisdiction, because the underlying jurisdictional statute contained no "affirmative grant of pendent-party jurisdiction."

[3] Ancillary Jurisdiction

Ancillary jurisdiction extended jurisdiction from the freestanding (often diversity) claim to an otherwise jurisdictionally insufficient claim by the ***defendant(s)*** or similarly situated parties such as intervenors as of right. E.g., in a diversity action, ancillary jurisdiction supported a compulsory counterclaim or cross-claim for less than the jurisdictional amount or impleader of a non-diverse party.

Ancillary jurisdiction originally developed independently of pendent jurisdiction. The Supreme Court recognized ancillary jurisdiction of claims:

- "ancillary and dependent, supplementary merely to the original suit, out of which it had arisen." [*Freeman v. Howe*, 65 U.S. 45 (1860)]
- transactionally-related state law counter-claims. [*Moore v. New York Cotton Exchange*, 270 U.S. 593 (1926)]
- in diversity cases where there existed constitutional power to hear the jurisdictionally insufficient claims and where Congress had neither expressly nor impliedly negated the exercise of jurisdiction. [*Owen Equipment & Erection Co. v. Kroger*, 437 U.S. 365 (1978)]

Nevertheless, following *Finley* (regarding pendent party jurisdiction), some lower federal courts extended to ancillary jurisdiction *Finley's* insistence on affirmative evidence of Congressional approval for such exercise of jurisdiction by federal courts.

[4] Supplemental Jurisdiction

In 1990, Congress responded to *Finley* by enacting the supplemental jurisdiction statute, essentially over-ruling the case. [28 U.S.C. § 1367]

[a] Qualifying Under Section 1367(a)

Subsection 1367[a] expressly extends federal jurisdiction from freestanding claims within the original jurisdiction of the federal court to supplemental claims that are "so related [to

the freestanding claims . . . that they form part of the ***same case or controversy*** under Article III of the United States Constitution."

Subsection 1367(a) overrules *Finley* by expressly providing that "supplemental jurisdiction shall include claims that involve joinder or intervention of parties," thereby authorizing jurisdiction over what were formerly called pendent party claims. Most courts have found that claims which satisfy the same transaction or occurrence standard for joinder under FRCP 13(a) (compulsory counterclaim), 13(g) (crossclaim), or 20 (joinder of parties) also qualify for supplemental jurisdiction.

[b] Disqualifying Under § 1367(b)

Subsection 1367(b) provides that in ***diversity-only*** cases the courts do not have supplemental jurisdiction over claims ***by plaintiffs*** against persons made parties by FRCP 14 (impleader), 19 (compulsory joinder of parties), 20 (permissive joinder of parties) or 24 (intervention), when exercising such jurisdiction would be inconsistent with the jurisdictional requirements of the diversity statute. Thus, a plaintiff may not assert claims against parties in a diversity action if supplemental jurisdiction would negate complete diversity.

[c] Discretion Under § 1367(c)

Subsection 1367(c) gives courts discretion to refuse jurisdiction when it believes, in the interests of judicial economy, convenience, fairness, and comity, that the supplemental claims would more appropriately be decided by state courts.

[d] 100-mile Bulge Rule

When supplemental jurisdiction is asserted over third-party defendants and indispensable parties, service may be effectuated by the 100-mile bulge rule, if such parties cannot be served within the state in which the federal court sits. The rule allows service on such added parties anywhere within 100 miles of the federal courthouse in which the action is pending. [FRCP 4(K)(1)(B)]

Chapter 5
VENUE

§ 5.01 General Principles

Venue refers to the place within a judicial jurisdiction in which a case is to be tried. Venue principles are aimed at the selection of the most convenient and logical court within a given court system.

Venue is determined by statute, but parties can stipulate or contract to an otherwise improper venue. Objections to venue are waived unless timely asserted. Improper venue does not subject a judgment to collateral attack.

§ 5.02 Venue Under State Judicial Systems

Typically venue in state judicial systems may be based on some or all of the following factors:

- the locus of the *res* (property) or event that is the subject of the lawsuit.
- where the defendant resides.
- where the defendant does business, or retains an agent.
- where the plaintiff resides.
- where the plaintiff does business.
- in suits by or against government parties, where the seat of government is located.

§ 5.03 Venue Under the Federal Judicial System

Venue in federal courts is controlled by 28 U.S.C. § 1391. The statute provides two grounds for venue and a fallback provision.

[1] Defendant's Residence

In both diversity and federal questions cases, venue may be proper in the district where the defendant resides, or if there are multiple defendants, in any district where any defendant resides provided that all defendants reside in the state in which the federal court sits. Most courts equate residence with ***domicile*** for venue purposes. Subsection 1391(c) defines the ***residence of a defendant corporation*** to be "***any judicial district in which it is subject to personal jurisdiction*** at the time the action is commenced." This test has been applied to unincorporated associations as well for purposes of venue.

[2] Locus of Substantial Part of Events or Property at Issue

Venue may be proper in the judicial district "in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of the property that is the subject of the action is situated."

[3] Fallback Venue

If, based on the preceding grounds, there is no district in which the action may otherwise be brought:

(1) ***diversity actions*** may be brought in "a judicial district in which any defendant is subject to personal jurisdiction at the time the action is commenced." [28 U.S.C. § 1391(a)(3)]

(2) ***federal question*** cases may be brought in a judicial district "in which any defendant may be found." [28 U.S.C. § 1391(b)(3)]

The fallback provision set forth in § 1391(a)(3) is largely invoked when there are defendants who do not reside in the same state and either the claim arose outside the United States or all of the defendants are not subject to personal jurisdiction where a substantial part of the claim-related events occurred.

§ 5.04 Change of Venue Outside of Judicial System; *Forum Non Conveniens*

State courts have no power to transfer cases to the courts of other states, and neither state nor federal courts have the power to transfer cases to the courts of foreign countries. In such cases, most judicial systems permit dismissal of suits under the common law doctrine of ***forum non conveniens,*** in anticipation that the plaintiff will recommence the suit in the alternative foreign venue. To obtain a *forum non conveniens* dismissal, the defendant must:

(1) demonstrate that an ***adequate alternative forum is available***. [*Gulf Oil Corp. v. Gilbert,* 330 U.S. 501 (1947)]

(2) show that considerations of ***party and forum convenience override the plaintiff's choice*** of forum and justify dismissal. Typical such considerations include: relative ease of access to proof, availability of compulsory process for attendance of witnesses, the cost of obtaining their attendance, the possibility of obtaining a jury view of the scene of the accident or property which is the subject of the action, and the enforceability of any eventual judgment in the original forum.

§ 5.05 Transfer of Venue Within the Same Judicial System

Inter-system transfer has been codified in many jurisdictions. Under the federal transfer statute, 28 U.S.C. § 1404, both plaintiffs and defendants may seek transfer to a district where the case could have originally been brought. Transfer is available upon a lesser showing than required for *forum non conveniens* dismissal; generally for "the convenience of parties and witnesses, [or] in the interest of justice." [28 U.S.C § 1404(a)] Any contractual choice of forum between the parties is not dispositive but is a factor to be considered.

Statutory transfer is intended only to change the ***place of trial***, and not the applicable law or the availability of limitations defenses. Upon transfer, the court must ***apply the law that would have been applied in the transferor court,*** whether the movant was the plaintiff or the defendant.

Chapter 6
ASCERTAINING APPLICABLE LAW

§ 6.01 Rules of Decision Act

The Rules of Decision Act, 28 U.S.C. § 1652, provides that federal courts must apply state law except where otherwise required by the United States Constitution, the laws of the United States, or treaties. Thus, cases tried in federal court based on a federal question are decided by federal law. However, the issue of whether state or federal law applies in diversity cases may be less clear.

Swift v. Tyson, 41 U.S. 1 (1842), interpreted the Rules of Decision Act to require federal courts to apply state constitutional and statutory law but not state common law. The ***Swift doctrine*** permitted federal judges to ***displace state common law with federal general common law in diversity cases.***

§ 6.02 *Erie* Doctrine; "Substance versus Procedure" Test

The 100-year reign of *Swift* was terminated by the Supreme Court's decision in *Erie R.R. v. Tompkins,* 304 U.S. 64 (1938). In *Erie*, the plaintiff sought to recover for injuries he received when struck by an object protruding from defendant's passing train. Plaintiff was on a path adjacent to the tracks at the time of the accident. The defendant railroad argued that the common law of Pennsylvania regarded the plaintiff as a trespasser under the circumstances and imposed upon the defendant railroad only the duty to refrain from acts of wanton negligence. Plaintiff countered that the federal diversity court was free under *Swift* to disregard Pennsylvania common law and to regard plaintiff as an invitee to whom defendant owed a duty of ordinary care under federal general common law.

The United States Supreme Court ruled in favor of the defendant and, in so doing, overruled *Swift*'s by concluding that ***there is no federal general common law***. The Court found that the Rules of Decision Act did not distinguish between state law that is legislatively created and state law that is judicially created, and thus the ***Act did not confer upon federal courts the power to determine substantive common law.*** *Erie* established that in federal diversity cases, matters characterized as ***substantive would be governed by state law,*** and those characterized as ***procedural would be governed by federal law***. This became known as the "substance versus procedure" test.

§ 6.03 "Outcome Determination" Test

In *Guaranty Trust Co. v. Yor,* 326 U.S. 99 (1945), the Court concluded that the substance-versus-procedure test would not be adequate to resolve all issues arising under the Rules of Decision Act ***where a state law is both substantive and procedural in purpose***, such as statutes of limitations. In *Guaranty Trust* the defendant argued that *Erie* required application of the state statute of limitations, which would have barred the

action, while the plaintiff argued that federal law, under which the action was timely filed, governed.

Agreeing with the defendant, the Supreme Court found the intent of the *Erie* doctrine to be that in diversity cases "the ***outcome of the litigation in the federal court should be substantially the same***, so far as legal rules determine the outcome of a litigation, ***as it would be if tried in a State court***." Under this "outcome-determination" test, ***state law controls if the choice*** between state or federal law ***could be outcome-determinative*** in the case.

§ 6.04 "Balancing of Governmental Interests" Test

In *Byrd v. Blue Ridge Rural Electric Cooperative, Inc.,* 356 U.S. 525 (1958), a negligence case, the defendant argued that the plaintiff's claim was covered by workers' compensation, for which South Carolina precluded a jury trial. Noting that the outcome of the case could be substantially affected by the issue of whether the case was tried by a judge or a jury, the Supreme Court nevertheless concluded that the outcome-determination test did not suffice in close cases. The Court added a step to the analysis that involved a ***balancing of the governmental interests behind the rules contending for application***. On the facts at issue in *Byrd*, the Court held that the plaintiff was entitled to a jury trial, finding that the federal policy supporting jury trials was stronger than any policy beneath South Carolina's rule precluding jury trials in such cases.

§ 6.05 Federal Rules of Civil Procedure

[1] Federal Rules Control When State Law Conflicts

The Supreme Court added yet another step to the choice-of-law analysis in *Hanna v. Plumer,* 380 U.S. 460 (1965). The plaintiff suffered personal injuries in an automobile accident and brought a federal diversity action against the estate of the alleged wrongdoer. The plaintiff served the administrator of the estate by leaving a copy of the papers at his home in compliance with FRCP (4)(d)(1). The defendant-administrator argued, however, that the action could not be maintained because he had not been personally served as required by Massachusetts law.

The Court held that ***federal procedural rules*** (unless found constitutional and invalid under the Rules Enabling Act) ***are not overridden by state law*** or policy. Thus, ***Erie does not control*** when there exists an ***applicable federal rule*** that ***conflicts*** with the state law or policy.

[2] Rules Enabling Act

An applicable Federal Rule of Civil Procedure controls, so long as it is constitutional and complies with the Rules Enabling Act, 28 U.S.C. § 2072, which in part states that federal rules "shall not abridge, enlarge or modify any substantive right." In *Burlington*

Northern Railway v. Woods, 480 U.S. 1 (1987), the Supreme Court determined that ***rules which incidentally affect litigants' substantive rights*** do not violate the Rules Enabling Act if reasonably necessary to maintain the integrity of that system of rules. In fact, the Court has never invalidated any Federal Rule of Civil Procedure under the Rules Enabling Act.

[3] Conflict Between Federal Rule and State Law

When a federal rule and state law or policy conflict, the *Hanna* analysis is relevant and the federal court is to apply the federal rule. However, when there is ***no conflict, the Erie doctrine controls.***

In *Walker v. Armco Steel Corp.*, [446 U.S. 740 (1980)], the Court found no such conflict because a court's refusal to apply the federal rule at issue would not in fact thwart some purpose the federal rule was intended to achieve. Thus, *Walker* reminds that favored treatment for federal procedural rules under the Rules Enabling Act is only appropriate when a rule is in fact applicable.

§ 6.06 Summary of *Erie* Analysis Under Modern Law

Modern *Erie* doctrine invokes all three tests — substance-versus-procedure, modified outcome determination, and the balancing test of state and federal interests — depending on the circumstances of individual cases.

(1) The substance-versus-procedure test serves as a first-stage screening device in *Erie* analysis. An issue that clearly addresses legal rights is substantive and is to be resolved according to state law; issues that clearly pertain to the judicial process alone are procedural and invoke federal law.

(2) Where the issue is not grounded entirely on substantive or procedural policies but instead derives from both, such as a statute of limitations, the next level of analysis of the *Erie* doctrine is the outcome-determination test, under which state law controls where it serves substantive interests at least in part and where refusal to do so would affect the outcome of the case.

(3) *Erie* doctrine does not apply if there exists a federal rule that addresses the issue at hand, and it conflicts with state law. In such cases, the federal procedural rule controls.

(4) When the issue invokes the *Erie* doctrine but is not adequately resolved by the substance-versus-procedure and modified outcome-determination tests, the policies underlying both the federal law and state law are examined, with weight given to the policy of greater importance.

§ 6.07 Conflicts of Law

Where there are parties from different states or the events leading to the cause(s) of action occurred in more than one state, the presiding court must determine which state's substantive laws apply, including which choice-of-law rules apply. In *Klaxon Co. v. Stentor Electric Mfg.,* 313 U.S. 487 (1941), the Supreme Court extended the *Erie* principle to conflicts questions, and required ***federal diversity courts to administer the conflicts law of the states in which they were sitting*** ("forum states").

§ 6.08 Ascertaining the Content of State Law

A federal court presiding over a diversity action must apply the relevant state law as would the highest state court whose law is being applied if it was hearing the case. When the issue at hand has been decided by the state's highest court, the federal court sitting in diversity must generally follow such precedent. However, federal diversity courts need not follow state high court precedents when they are convinced that the state high court would not follow them either if given the chance to again rule on the issue.

When state law is unsettled, unless the federal court is successful in getting the question certified by the state's highest court, the federal court must attempt to forecast the state's law as it would be expressed by its highest court. Decisions of intermediate state appellate courts carry considerable weight in such situations, although there is a difference in opinion as to whether federal courts *must* follow the decisions of intermediate state appellate courts in the absence of convincing evidence that the state's highest court would decide differently.

Chapter 7
PLEADINGS

§ 7.01 Modern Notice Pleading

[1] Purpose of Modern Pleadings

Although common law required pleading to formulate issues for trial, and many state codes require pleadings to present facts on the claims stated therein, the purpose of modern federal pleading rules is simply to ***give notice of claims and defenses adequate for the opposing party to make discovery requests and prepare for trial***. There are three types of pleading under the federal rules: complaint, answer, and in limited circumstances, reply.

[2] Liberal Pleading

The federal rules permit liberal pleading. Thus, modern notice pleading has substantially eliminated the theory-of-the-pleadings approach. As long as the pleader asserts some theory that would entitle the claimant to relief, the pleading is sufficient. FRCP 8(e)(2) expressly permits the pleading of alternative or hypothetical claims and defenses and as many claims or defenses as a party has "regardless of consistency." FRCP 8(a) permits demands for alternative types of relief.

FRCP 15(b) permits amendment of the pleadings to conform to the evidence at trial, and indeed provides for constructive amendment when the parties have consented to any variance from the pleadings.

FRCP 54(c) provides that "every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in the party's pleadings."

[3] Form of Notice Pleading

Modern notice pleading requires no "technical forms of pleading." [FRCP 8(e)(1)] A pleading need only include a caption, numbered paragraphs containing averments "limited as far as practicable to a statement of a single set of circumstances," and separate counts for different claims or defenses. None of these requirements is strictly enforced because "[a]ll pleadings shall be so construed as to do substantial justice." [FRCP 8(f)]

[4] Special Pleading Rules

While notice pleading – which does not require facts to be pleaded with particularity – is the norm, FRCP 8(a) does impose a particularity requirement for pleading any "special matters" set forth in FRCP 9. Special matters are generally claims that would not necessarily be anticipated by the adversary, e.g.:

- a denial of a party's capacity to sue or be sued.
- denial of the occurrence or performance of a condition precedent.
- suits based on fraud or mistake.
- claim for special damages, i.e., damages for injuries that are not a normal and expected consequence of the event at hand.

§ 7.02 FRCP 11

[1] Certification of Court Documents

FRCP 11(a) requires that every pleading, written motion, and other paper be signed by an attorney of record, or the party, if unrepresented by counsel. Pleadings need not generally be verified or accompanied by affidavit. By signing a pleading or other judicial document, the attorney or party certifies that, "to the best of his knowledge, information, and belief formed after reasonable inquiry":

(1) the pleading is ***not being presented for any improper purpose***, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;

(2) the claims, defenses, and other legal contentions therein are ***warranted by existing law*** or by a non-frivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;

(3) the allegations and other factual ***contentions have evidentiary support*** or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and

(4) the ***denials of factual contentions are warranted on the evidence*** or, if specifically so identified, are reasonably based on a lack of information or belief.

[2] Violations and Sanctions

FRCP 11 is violated by ***"signing, filing, submitting, or later advocating"*** a paper when the litigant knows that it is no longer well-grounded, thus imposing on litigants a continuing duty to correct or even withdraw papers in light of post-filing events.

Courts may impose FRCP 11 sanctions of their own initiative but generally a FRCP 11 motion is made by the pleader's adversary. Sanctions, imposed at the discretion of the court, may include: reasonable attorneys fees; fines; striking the offending paper; admonishing, reprimanding, or censuring the offender; requiring the offender to participate in educational programs; or referring the matter to disciplinary authorities.

FRCP 11(c)(1)(A) grants a litigant 21 days between service and filing of a FRCP 11 motion to correct or withdraw the offending paper.

§ 7.03 The Complaint

In federal practice, an action commences with the filing of the complaint. [FRCP 3] The complaint is to be served on the defendant within 120 days of filing. [FRCP 4(m)] The complaint must include:

(1) a **statement of jurisdiction –** FRCP 8(a) requires the claimant to include a statement of the "grounds upon which the court's jurisdiction depends" unless the court already has jurisdiction and the claim needs no independent grounds; and

(2) a **statement of the claim –** FRCP 8(a) requires the complaint to include "a short and plain statement of the claim showing that the pleader is entitled to relief." The pleader must at least allege a *prima facie* claim.

§ 7.04 The Answer

The answer may contain three kinds of responses: denials controverting the pleader's allegations; defenses; and claims by the defendant.

[1] Denials

In all jurisdictions, the defendant must admit or deny in the answer all the well-pleaded allegations of the complaint. Failure to deny an allegation in a required responsive pleading, other than an allegation of the amount of damages, is deemed an admission. Admissions are deemed conclusive at trial. [FRCP 8(d)]

[2] Defenses

Besides denials, an answer should contain "in short and plain terms" other defenses to each claim in the complaint. [FRCP 8(b)] FRCP 8(c) lists the ***affirmative defenses*** that must be pleaded in the answer in order to raise them at trial, including:

- statute of limitations.
- illegality.
- fraud.
- contributory negligence.
- accord and satisfaction.
- arbitration and award.
- assumption of risk.
- discharge in bankruptcy.
- duress.

Other defenses such as lack of jurisdiction, improper venue, insufficient service of process, or failure to state a claim upon which relief may be granted, may be asserted in either the answer or a FRCP 12(b) motion to dismiss.

[3] Defense Claims

A defendant may also respond to the complaint by asserting claims against the plaintiff, other defendants or third parties.

[4] Timing of the Answer

Generally the answer must be served within 20 days after service of the complaint. If the plaintiff sends the defendant a request to waive formal service, and the defendant agrees to accept service by mail, the defendant has 60 days from the date the request was sent within which to answer. [FRCP 12(a)(1)(B)]

If the defendant brings a pre-answer FRCP 12 motion to dismiss the complaint but does not prevail, he has 10 days after the court denies the motion in which to serve the answer.

§ 7.05 Reply to Answer

Under the federal rules, further pleading is necessary after an answer only if it introduces a claim, which is treated as tantamount to a complaint. FRCP 7(a) requires a reply to a counterclaim denominated as such and answers to all other claims included in the original answer, served within 20 days after service of the answer. No other pleadings are allowed as of right, and all averments in the last required pleading are deemed denied or avoided.

§ 7.06 Supplemental Pleadings

FRCP 15(d) authorizes supplemental pleading "setting forth transactions or occurrences or events which have happened since the date of the pleading sought to be supplemented." Such pleadings are most commonly used to allege new damages, or affirmative defenses that have accrued since filing of the complaint, such as discharge in bankruptcy, release or *res judicata*. Before a supplemental pleading may be filed the court must grant leave and may set conditions designed to minimize its impact on the pending litigation. No responsive pleading to a supplemental pleading is permitted without court order.

§ 7.07 Amendment of Pleadings

[1] Amendment Without Permission of the Court

FRCP 15(a) provides that a party may amend "once as a matter of course" (without permission from the court or consent of other parties) before a responsive pleading is served, or within 20 days of service if no responsive pleading is required.

[2] Amendment Requiring Permission of the Court

FRCP 5(b) authorizes pleading amendments upon consent by the court during trial and even after judgment, "to conform to the evidence."

[3] Amendment and the Statute of Limitations

[a] Amendments to Claims

In federal actions, an amendment of a claim or defense relates back to the date of service of the original pleading if the doctrine of relation back is permitted by controlling state or federal statute of limitations law, or if it is allowed by FRCP 15(c)(2). FRCP 15(c)(2) allows relation back when "the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth . . . in the original pleading." Thus, the ***transactional relationship test permits relation back of amendments that merely change the legal theory on which plaintiff seeks relief*** for the identical transaction. However, when the amendment presents a new claim that is factually unrelated to the original claims, it operates, in effect, as a separate action, which must independently satisfy the statute of limitations.

[b] Amendments to Parties

As a general rule, amendments to add parties are disallowed in most jurisdictions, except when the amendment arises out of the same transaction as the original pleading and the new party had timely notice of the original pleading. In federal court, an amendment regarding parties relates back if relation back is permitted by the state or federal law that provides the applicable statute of limitations, or if it is permitted by FRCP 15(c)(3). Under that rule, the ***amendment relates back if***:

(1) the ***claim arises out of the same conduct, transaction, or occurrence*** set out in the original pleading, and

(2) the party added by amendment:

(a) within the 120-day period provided by FRCP 4(m) for service of process, ***received such notice of the institution of the action*** that the added party would not be prejudiced in defending on the merits and

(b) ***knew or should have known*** that the action would originally have been brought against the added party, but for a mistake in identity of the proper party.

Many jurisdictions permit relation back of an amendment which simply corrects a *misnomer* — a reasonable mistake in the name of the party intended to be sued. In such a case, the party intended to be sued received notice of the action from the original complaint. Relation back is also permitted in some jurisdictions when there is sufficient *identity of interests* between the party originally sued and the new party that notice to the former can be imputed to the latter.

§ 7.08 FRCP 12 Motions on the Pleadings

FRCP 12 sets forth a number of motions than can be brought in response to the pleadings.

[1] Motions to Dismiss the Complaint

[a] FRCP 12(b)(6)

A 12(b)(6) motion is brought by a defendant seeking to dismiss the complaint for failure to state a claim upon which relief can be granted. It may be filed at any time in the proceedings, even at trial. [FRCP 12(h)(2)] A 12(b)(6) motion ***alleges that based on the facts alleged in the complaint, there is no legal theory under which plaintiff can obtain relief***. The motion is not granted "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." [*Conley v. Gibson*, 355 U.S. 41 (1957)] If granted, the complaint is typically dismissed without prejudice so that the plaintiff can amend it.

[b] Other 12(b) Motions

FRCP 12(g) and 12(h)(1) provide that the following defenses are waived unless they are asserted in a single pre-answer motion, or, if none is filed, in an answer or reply or any amendment thereto permitted as a matter of course:

- lack of personal jurisdiction. [FRCP 12(b)(2)]
- improper venue. [FRCP 12(b)(3)]
- insufficiency of process. [FRCP 12(b)(4)]
- insufficiency of service. [FRCP 12(b)(5)]

In contrast, a defense of lack of subject matter jurisdiction [FRCP 12(b)(1)] may be raised at any time, even after the trial. [FRCP 12(h)(3)]

[2] Motion for Judgment on the Pleadings

After service of all the pleadings in a case, either side may seek ***judgment on the pleadings*** under FRCP 12(c). Upon submission of materials in addition to the pleadings, the motion becomes one for summary judgment.

[3] Motions to Strike

FRCP 12(f) allows a plaintiff or defendant to move to strike from a pleading "any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter" prior to responding to a pleading, or if no responsive pleading is permitted, within 20 days after service of the pleading.

[4] Motion for More Definite Statement

Where a pleading to which a responsive pleading is permitted is so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading, the party may move for a more definite statement prior to responding. If the motion is granted and the pleading is not corrected within 10 days after notice of the order, the court may strike the pleading. [FRCP 12(e)]

Chapter 8
COMPLEX PLEADING AND PRACTICE

§ 8.01 Claim Joinder

FRCP 18 allows a party who has made a claim against another to join further claims with it against the same opponent. It authorizes claim joinder without limitation, ***regardless of whether the claim to be joined is related to the pre-existing claims*** or not, as long as the joined claim satisfies subject matter jurisdiction requirements.

§ 8.02 Counterclaims

A party may assert a counterclaim against one who previously asserted a claim against him/her. Counterclaims may be ***compulsory*** [FRCP 13(a)] or ***permissive*** [FRCP 13(b)].

[1] Compulsory Counterclaims

A claim that ***arises out of the same transaction or occurrence*** as the subject matter of the opposing party's claim must be asserted in the present action or is forever barred, except for the following claims:

- claims requiring joinder of parties over whom the court lacks personal jurisdiction.
- *in rem* claims.
- *quasi in rem* claims.

Most federal courts interpret "arises out of the transaction or occurrence that is the subject matter of the opposing party's claim" as being ***logically related*** to the underlying claim.

Compulsory counterclaims ***fall within the court's supplemental jurisdiction*** and thus require no showing of independent grounds for subject matter jurisdiction.

[2] Permissive Counterclaims

Any claim against an opponent that does not arise out of the same transaction or occurrence as the opponent's claim is permissive in nature. Failure to assert it does not bar its assertion in a subsequent litigation. Generally, permissive counterclaims fall outside the court's supplemental jurisdiction.

§ 8.03 Cross-Claims

A party may assert a claim against ***a co-party*** – a cross-claim – arising out of the transaction or occurrence that is the subject matter of:

- the original action;
- a counterclaim; or
- relating to property that is the subject matter of the original action.

Cross-claims are generally within federal courts' ***supplemental jurisdiction***. One may either plead a cross-claim or reserve it for further litigation; cross-claims are never compulsory under FRCP 13(g).

§ 8.04 Joinder of Parties

[1] Permissive Joinder

FRCP 20 permits joinder of plaintiffs or defendants provided that the claims joined to bring multiple parties into the lawsuit:

(1) ***arise from the same transaction or occurrence;*** and
(2) have a ***common question of law or fact.***

Additional defendants to be joined must meet the requirements of personal and subject matter jurisdiction, as ***supplemental jurisdiction does not apply*** to such claims. Thus, in a diversity action, joinder of additional defendants must not destroy complete diversity among the parties. The jurisdictional amount must also be met by each defendant individually; such claims cannot be aggregated.

[2] Compulsory Joinder

FRCP 19 compels joinder in certain circumstances where the adjudication of pending claims will be compromised without the involvement of the party sought to be joined. FRCP 19(a) provides a framework for determining whether the party is ***"necessary"*** to the action. ***A necessary party must be joined if feasible.*** If joinder is not feasible, a court must determine, pursuant to FRCP 19(b), whether the person's non-involvement will be so detrimental that the case cannot proceed without the person. Such parties are deemed ***"indispensable."***

[a] Necessary Parties

FRCP 19(a) sets forth the circumstances under which a party is deemed "necessary":

(1) if ***complete relief cannot be accorded among existing parties*** in his absence;
(2) the ***absent party's ability to protect his interest*** relating to the subject of the action ***may be impaired*** without his involvement in the action;
(3) disposition of the action in his absence may ***subject existing parties to a "substantial risk of incurring double, multiple, or otherwise inconsistent obligations*** by reason of his claimed interest."

So long as joinder is ***feasible,*** a necessary party must be joined in order for the lawsuit to continue. If one sought to be joined as a plaintiff does not join voluntarily, under limited

circumstances, the court may compel such party to join, making the party an "involuntary plaintiff."

[b] Feasibility of Joinder

However necessary a person might be to the lawsuit, he will not be joined unless it is feasible to do so. Joinder is feasible only if he is subject to the personal jurisdiction of the court, and his joinder "will not deprive the court of jurisdiction over the subject matter of the action." FRCP 19(a) furthermore excuses an involuntarily joined party from the case if he "objects to venue and [his] joinder . . . would render the venue of the action improper."

[c] Indispensable Parties

When it is not feasible to join a party, the court may determine the party indispensable to the action, pursuant to FRCP 19(b). If the party is deemed indispensable, the action will be dismissed. The factors that determine whether a party is indispensable are:

(1) the extent to which a judgment rendered in the party's ***absence might be prejudicial*** to the party or existing parties;

(2) the ***extent to which the prejudice can be lessened or avoided*** by protective provisions in the judgment, by the shaping of relief, or other measures;

(3) whether a judgment rendered in the party's absence will be adequate; and

(4) ***whether the plaintiff will have an adequate remedy if the action is dismissed*** for nonjoinder. [FRCP 19(b)]

§ 8.05 Impleader (Third-Party Practice)

[1] Nature of Third-Party Practice

Impleader is a device by which a ***defendant can join a third party who may either share or be legally responsible for defendant's liability to plaintiff.*** In this capacity, defendant becomes a *third-party plaintiff,* the added party becomes a *third-party defendant.*

The defendant, as a third-party plaintiff, may also join other claims against the third-party defendant. Impleader furthermore makes available to the third-party defendant all the options available to defendants, e.g., counterclaims, cross-claims, and impleader of yet additional parties that could be fully or partially responsible for any liability the third-party defendant is found to have to the original defendant.

[2] Requirements for Impleader

Under FRCP 14, a claim sought to be impleaded must:

(1) have arisen out of the same transaction or occurrence as the original plaintiff's claim; and

(2) ***be contingent or derivative.***

[3] Common Theories of Contingent or Derivative Liability

(1) ***Indemnity*** – A right to indemnification either arises out of an express contractual provision whereby one party agrees to indemnify ("hold harmless") another for certain liabilities, or by implication when a person without fault is held legally liable for damages caused by the fault of another.

(2) ***Subrogation*** – Subrogation is the succession of one person to the rights of another. Often a subrogee is an insurer that has compensated an insured for an injury resulting from the negligence of a third-party.

(3) ***Contribution*** – The right of contribution typically arises among joint tortfeasors, two or more persons who are jointly or severally liable in tort for the same injury.

(4) ***Warranty*** – A warranty is an express or implied statement or representation typically made by a seller to a buyer or others in the chain of product distribution regarding the character of or title to the product.

[4] Jurisdictional Requirements

Subject matter jurisdiction is satisfied because third-party claims fall within the court's supplemental jurisdiction. Personal jurisdiction may be had over a third-party defendant if he can be served within the ***100-mile bulge*** of the courthouse. [FRCP 4(K)(1)(B)]

§ 8.06 Interpleader

When there are two or more claimants to a specific property or monetary fund ("stake"), interpleader allows a defendant to avoid multiple actions regarding the same stake by ***forcing all claimants to proceed against the stakeholder in one lawsuit.*** Two forms of interpleader exist in federal practice: one under FRCP 22 and one under 28 U.S.C. § 1335.

Whether proceeding by statute or FRCP 22, the defendant deposits with the court the stake which is the target of the competing claims. The stakeholder may seek interlocutory relief, enjoining maintenance of other suits against the stakeholder with respect to the fund during the federal interpleader action. In the interpleader action, the first court determines whether interpleader is appropriate on the facts of the case, and if so, adjudicates the adverse claims and distributes the stake. The stakeholder may be either disinterested (claiming no interest in the stake and getting excused from further involvement in the case) or interested (retaining a claim in the stake and continuing to be involved in the action through its resolution).

Statutory interpleader has some advantages over FRCP 22 interpleader. Under FRCP 22, the interpleaded claims must independently satisfy the requirements of subject matter and personal jurisdiction. Statutory interpleader on the other hand provides for:

- ***Nationwide service*** on claimants;
- ***Minimum diversity*** (only 2 adverse claimants need be citizens of different states);
- ***Amount in controversy*** significantly lower than the diversity jurisdictional amount ***(more than $500).***

§ 8.07 Intervention

Intervention, governed in federal trials by FRCP 24, provides a means for outsiders to join a lawsuit on their own initiative. Intervention may be of right under 24(a) or permissive under 24(b). In either case, there is ***no supplemental jurisdiction*** over claims.

[1] Intervention of Right

Intervention of right does not require court permission if three conditions are met:

(1) the intervenor claims ***an interest relating to the property or transaction*** which is the subject of the action;

(2) the intervenor demonstrates that the lawsuit carries a ***possibility of significant detriment*** to the intervenor;

(3) there is a ***substantial possibility that none of the present parties will adequately represent the intervenor's interest***. However, when the applicant's stake in the outcome is no greater than that of an existing party with whom the applicant would be aligned, and when that existing party is not in collusion with an opposing party, incompetent, or hostile toward the applicant, representation by the existing party often will be deemed adequate and intervention of right will be denied.

[2] Permissive Intervention

If one does not qualify to intervene as of right, he may petition the court to do so under FRCP 24(b). The claim or defense must have a question of law or fact in common with the pending action.

§ 8.08 Class Actions

[1] Certification

Class actions in federal court are governed by FRCP 23. In order to proceed as a class action, the group of interested parties much be certified as a class. FRCP 23(a) provides for certification of a class if:

(1) the class is so numerous that joinder of all members is impracticable ***("numerosity"*** requirement);

(2) there are questions of law or fact common to the class ***("commonality"*** requirement);

(3) the claims or defenses of the representative parties are typical of the claims or defenses of the class ***("typicality"*** requirement); and

(4) the representative parties ***will fairly and adequately protect the interests*** of the class.

[2] Categories of Class Actions

Class actions are authorized under FRCP 23 in four situations:

(1) where ***individual actions might result in inconsistent decisions*** that establish incompatible standards of conduct for the defendant. [FRCP 23(b)(1)(A)]

(2) where ***the interests of absent class*** members could be impaired if issues are resolved by individual actions. [FRCP 23(b)(1)(B)]

(2) where the primary relief sought is ***injunctive or declaratory***, not monetary. [FRCP 23(b)(2)]

(3) where "***questions of law or fact common to the members of the class predominate*** over any questions affecting only individual members," and where "a class action is ***superior to other available methods*** for the fair and efficient adjudication of the controversy." [FRCP 23(b)(3)]

Subsection (b)(3) sets forth the factors to be considered in determining whether a class action is ***superior*** to other methods:

(1) the interest of class members to ***individually control separate actions***.

(2) whether and to what extent ***any litigation concerning the controversy has already been undertaken***.

(3) the advantages or disadvantages of litigating the claims in ***the particular forum***.

(4) any likely ***difficulties in managing*** the class action.

[3] Binding Nature of Class Actions

Class actions brought pursuant to ***FRCP 23(b)(1) and (2) do not permit class members to "opt out"*** of the class. Therefore, all class members, whether or not they participate, are bound by settlement or adjudication of the class action and may not bring individual suits on the matter.

In contrast, members of a ***FRCP 23(b)(3) action may opt out*** from the class upon timely notice to the court. Members who exclude themselves from a (b)(3) action are not bound by the disposition of the class action and can bring their own action against the defendant.

[4] Notice Requirements

FRCP 23 requires notice only to (b)(3) class members, and such notice must be "the best notice practical under the circumstances." [FRCP 23(c)(2)] Nevertheless, courts have

held that due process requires adequate notice to members of all class actions, including those brought under subsections (b)(1) and (2).

In *Mullane v. Central Hanover Bank & Trust Co.,* 339 U.S. 306 (1950), the Supreme Court articulated the standard for notice of a pending class action that would satisfy due process. The Court required ***individual notice by mail*** for those persons whose names and addresses were known or could be determined with reasonable effort. However, where notice to other individuals would be impractical – e.g., where the identities of class members are unknowable or where the cost of ascertaining the names and addresses of parties would be considerable – the Court approved of ***constructive notice by publication.***

The class representative is to bear the cost of ***identifying members of the class*** [*Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340 (1978)] and ***notifying class members*** [*Eisen v. Carlisle & Jacqueli,* 417 U.S. 156 (1974)].

[5] Jurisdiction

Class representatives must meet the requirements of diversity and venue in federal class actions but passive class members need not.

There is uncertainty as to whether each class member in a diversity action must satisfy the ***amount-in-controversy***. In *Zahn v. International Paper Co.*, 414 U.S. 291 (1973), the Supreme Court ruled that all class members possessing a separate and distinct claim must satisfy the amount-in-controversy. However, some courts have interpreted the supplemental jurisdiction statute to make *Zahn* obsolete.

Individual members of a ***plaintiff-class***, aside from named representatives, need not satisfy the "minimum contacts" test in order for the forum ***state court*** to exercise personal jurisdiction over them. [*Phillips Petroleum Company v. Shutt,* 472 U.S. 797 (1985)]

§ 8.09 Consolidation

[1] Cases Pending in a Single District

FRCP 42(a) authorizes a federal court, at its discretion, to consolidate cases pending ***within the same judicial district*** involving a common question of ***law or fact.*** The claims need not arise out of the same transaction.

[2] Multidistrict Litigation

Civil actions involving one or more ***common questions of fact*** that are pending in different districts may be transferred to any district for coordinated or consolidated ***pretrial proceedings***. [28 U.S.C. § 1407] Transfers are authorized only when they "will be for the convenience of the parties and witnesses and will promote the just and efficient

conduct of such actions" and are most frequently invoked in antitrust cases, aviation accident cases, patent and trademark suits, products liability actions and securities law violation actions. Section 1407 applies only to pretrial proceedings and not trials.

Chapter 9
DISCOVERY

§ 9.01 Discoverable Material

FRCP 26(b) describes what may be discovered under the federal rules. Unless discovery has been otherwise limited by a protective order of the court, a party may discover any matter that is:

(1) ***relevant*** to a claim or defense;

(2) reasonably calculated to lead to discovery of ***admissible evidence;***

(3) ***not privileged;***

(4) ***not constituting work product*** (A special showing is required for discovery of work product prepared or acquired in anticipation of litigation or for trial.)

Discovery may include:

(1) ***information already in the discoverer's possession –*** Even when the discoverer already knows or possesses certain information, he is entitled to discover it from his adversary.

(2) ***impeachment material –*** Discovery includes material that may impeach an opponent's witnesses.

(3) ***opinions and contentions –*** Discovery is not limited to facts, but may also include opinions held by non-experts and contentions regarding the facts or the application of law to the facts.

(4) ***insurance agreements –*** FRCP 26(a)(1) expressly requires disclosure of insurance agreements available to satisfy any or all of any judgment, even though they remain inadmissible at trial.

§ 9.02 Questionable Areas of Discovery

[a] Financial Information

Unless the amount of a party's assets is itself a relevant issue in the case, as it would be in an action to enforce a money judgment or in an action for punitive damages measured by the amount of the assets, discovery of assets other than insurance, and of related information such as tax returns and bank statements, may be beyond the scope of discovery. Even when assets are relevant and discoverable, privacy concerns may warrant postponing discovery until the discoveree has had an opportunity to contest the claim to which the assets are relevant.

[b] Electronic Information

FRCP 26(b)(2) is silent about information stored in electronic form. In fact, the discovery rules generally appear to be document-oriented. Nevertheless, courts have almost universally interpreted FRCP 34 to allow discovery of electronic information if it is relevant and non-privileged.

§ 9.03 Privileged Communications

The attorney-client, doctor-patient, priest-penitent, interspousal privilege and the privilege against self-incrimination are commonly recognized privileges. In order to prove that a communication is privileged, the party claiming privilege must show that such communication:

(1) was made with an ***expectation of confidentiality***;

(2) is essential to a ***socially approved relationship*** or purpose; and

(3) ***has not been waived by disclosure*** of the contents of the communications to persons outside the relationship.

Privileges are narrowly construed in order to minimize their effect on liberal disclosure. The proponent of a privilege has the burden of establishing its existence. [FRCP 26(b)(5)]

§ 9.04 Work Product

[1] General Rule

Work product, generally defined ***as information prepared or obtained in anticipation of litigation or preparation for trial*** by or for a party or his representative, enjoys a qualified immunity under FRCP 26(b)(3). The Rule authorizes discovery of work product in the form of ***documents and tangible things*** only upon a showing that the party seeking discovery:

(1) has ***substantial need*** of the materials in the preparation of his case, and

(2) is ***unable without due hardship*** to obtain the equivalent of such materials by other means.

The current version of FRCP 26(b)(3) essentially codifies the case of *Hickman v. Taylor,* 329 U.S. 495 (1947), in which the Supreme Court recognized a common law qualified immunity of work product from discovery. In *Hickman*, the Court stated that when the discoverer of work product shows that production is "essential to preparation" of his case and that denial of discovery would cause hardship because "witnesses are no longer available or can be reached only with difficulty," production of "***relevant and non-privileged facts*** . . . in an attorney's file" should be allowed.

[2] Prepared in Anticipation of Litigation or for Trial

Immunity is limited by FRCP 26(b)(3) to materials "prepared in anticipation of litigation or for trial." Most courts add that the primary purpose of preparing the documents must have been to assist in such litigation. Thus, documents prepared for ordinary business purposes (*e.g.*, a routine accident report), public regulatory requirements (*e.g.*, statutorily-required report to police of automobile accidents involving injuries), or other nonlitigation purposes (*e.g.*, self-evaluation) fall outside the Rule.

[3] Documents and Tangible Things

The Court in *Hickman* emphasized that although the written witness statements and the attorney's memoranda were not discoverable on a bare demand, the discoverer was free to obtain the facts gleaned by discovery. The qualified immunity for work product ***does not protect against discovery of facts*** – which may be construed as "intangible things" – contained in the work product, including the ***identity*** of fact witnesses or the ***existence*** of the protected documents and things. However, federal courts have ruled that the discoveree may not be compelled to reveal facts to the extent that he is essentially recreating the protected document for the discoverer.

Although witness statements qualify as work product, FRCP 26(b)(3) expressly provides that a party or witness may on demand obtain a copy of his own substantially verbatim statement concerning the subject matter of the action.

[4] Party's "Representative"

As used in FRCP 26(b)(3), "representative" includes a party's attorney, consultant, surety, indemnitor, insurer, or agent.

[5] Undue Hardship

Hickman demonstrates that the "undue hardship" requirement may be satisfied when important facts are exclusively in the control of the discoveree such that the party seeking discovery has no other reasonable access to the information. For example, undue hardship may exist where:

(1) a witnesses died, moved beyond the reach of compulsory process, lost his memory, deviated from his prior testimony or refused to cooperate; or

(2) evidence that has physically disappeared or been altered is reflected in work product, such as photographs of skid marks or conditions at the scene of an accident.

[6] Opinion Work Product

FRCP 26(b)(3) provides what appears to be an absolute immunity for opinion work product, defined as "mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation."

§ 9.05 Experts

FRCP 26 differentiates between experts expected to testify at trial (*testifying experts*) and those merely retained or specially employed in anticipation of trial who are not, however, expected to testify (*non-testifying experts*). FRCP 26(a)(2) requires disclosure of the identity and expected testimony of the testifying experts and FRCP 26(b)(4)(A) permits their depositions. FRCP 26(b)(4) conditionally protects the non-testifying experts from discovery absent a special showing.

Excluded from the Rule's protection is any expert who acquires his information directly as either a participant or observer about the transactions or occurrences underlying the lawsuit. In such circumstances, the "expert" is in fact an ordinary fact witness. E.g., a police officer who responds to the accident scene, a doctor who attends in the emergency room, a mechanic who services the car whose brakes failed.

§ 9.06 Mechanics of Discovery

[1] Mandatory Discovery Conference and Discovery Plans

FRCP 26(f) requires parties to a lawsuit to confer as soon as practicable to discuss the case and possibilities for settlement, to arrange for required disclosures, and to develop a discovery plan incorporating these and other agreements for subsequent discovery. FRCP 26(d) precludes discovery prior to such conference.

[2] Required Disclosures

FRCP 26(a) mandates three types of discovery that must be ***automatically produced*** regardless of discovery request:

(1) initial disclosures of ***basic information***;
(2) disclosures of ***expert testimony***; and
(3) pretrial disclosures of ***trial evidence***.

A party who without substantial justification fails to disclose material subject to required disclosure is precluded under FRCP 37(c)(1) from introducing the material at trial.

[a] Initial Disclosures

Basic information covered by FRCP 26(a)(1) includes:

(1) the identity of possible ***fact witnesses*** that may be called at trial;
(2) identification of ***documents*** and other tangible items in the possession, custody or control of a party, "that the disclosing party may use to support its claim or defenses,"
(3) ***computation of damages*** claimed, "making available for inspection and copying . . . evidentiary material, not privileged or protected from disclosure, on which

such computation is based, including materials bearing on the nature and extent of injuries suffered."

(4) ***insurance policies*** that may be used to satisfy part or all of a judgment.

Excluded from FRCP 26(a)(1) are witnesses and documents that will either be ***used solely for impeachment*** or will not be used at trial.

[b] Pretrial Disclosures

In addition to the required disclosure of expert witness testimony, the parties must exchange lists of trial witnesses and trial exhibits at least 30 days before trial.

[3] Supplementation of Discovery

Under FRCP 26(c) and (e), a party must ensure the continued accuracy of the following types of discovery throughout the lawsuit:

(1) automatic discovery required by FRCP 26(a);
(2) disclosures made by expert witnesses that are to testify at trial; and
(3) responses to an interrogatory, request for production, or request for admission.

If such discovery becomes incomplete or inaccurate, the party or his/her attorney must provide additional or corrective information to the opponent, if not already known by the opponent. A common sanction for breach of the duty to supplement is exclusion at trial of evidence withheld by the discoveree. This sanction is inappropriate, however, if a continuance and opportunity for mid-trial discovery can enable the discoverer to overcome his/her surprise and prepare effective cross-examination and rebuttal.

§ 9.07 Depositions

[1] Procedure for Taking

To depose a party or non-party witness, FRCP 30 requires reasonable written notice to the deponent and all parties to the action of the time and place of the deposition and identity of the deponent. A party must comply with the notice or else seek a protective order because, by the initial service of process on him/her, he/she is already under the personal jurisdiction of the court. Thus, no subpoena is required to compel the attendance of a party-deponent but may be used to compel an uncooperative non-party deponent.

If documents to be used in conjunction with the deposition are sought, the deposing party must attach to the deposition notice:

- a FRCP 34 request for production of documents for a party-deponent
- a subpoena duces tecum for a non-party.

Under FRCP 30(b)(6), a party may name as a deponent in his notice and subpoena a corporation, agency, partnership or other legal entity and describe the matters on which examination is requested. The entity must then designate one or more officers, directors, managing agents or other persons with relevant knowledge to testify on its behalf.

[2] Use of Depositions at Trial

Under FRCP 32(a) any or all of a deposition may be used at trial, as if the witness were then present and testifying against any party who had notice of the deposition and a reasonable opportunity to obtain counsel or to move for a protective order.

FRCP 32(a) permits the use of deposition testimony to impeach or contradict the deponent as a witness, or as an admission of a adverse party or officer, director, managing agent or designated deponent of an adverse party. In addition, FRCP 32(a) permits the use of deposition testimony at trial when the deponent is unavailable because of death, illness, age, imprisonment or is beyond the reach of process. However, FRCP 32 only overcomes the initial hearsay hurdle to the use of a deposition, which must otherwise be admissible under the rules of evidence.

§ 9.08 Interrogatories

Interrogatories are written questions directed to a party, who must answer them in writing and under oath, or object with particularity. Interrogatories target not just what is known by the discoveree, but also what is reasonably obtainable by the dicoveree — "the collective knowledge" of the recipient. "A party is charged with knowledge of what his agents know, or what is in records available to him, or even, for purposes of FRCP 33, what others have told him on which he intends to rely in his suit."

FRCP 33(a) limits the number of questions (taking into account discrete subparts of questions) that can be posed to another party to 25, unless otherwise stipulated to by the parties or ordered by the court.

§ 9.09 Production and Entry Requests

FRCP 34(a) authorizes the discoverer to request that a party produce and permit:

(1) inspection and copying of documents;
(2) copying, testing or sampling of things; or
(3) entry upon land.

A FRCP 34 request must designate the documents, things or land with reasonable particularity and specify the time, place and manner of production or entry.

A FRCP 34 production request embraces not only that which is in the possession of the discoveree but also documents and property within her custody or control.

§ 9.10 Physical and Mental Examinations

When the physical or mental condition of a party (or person in the custody or legal control of a party) is in controversy, a court may on motion and for good cause shown order the party or person to undergo a physical or mental examination under FRCP 35.

FRCP 35(b) establishes a rule of reciprocity for the exchange of examination reports. The examinee is entitled to the report of the examination upon request. In exchange, the examinee must produce any prior reports of examinations of the same condition, and waives any privilege he/she has regarding the testimony of anyone who has or will examine him/her concerning that condition.

§ 9.11 Requests for Admissions

Federal FRCP 36 provides a mechanism by which a party may request his adversary to admit the truth of any matters within the scope of discovery. An admission obtained under FRCP 36 conclusively establishes such matter and is binding at trial. Admissions may be withdrawn or amended with leave of court pursuant to FRCP 36(b) if it will subserve the presentation of the merits and the party who requested the admission is unable to show prejudice from the amendment.

If a party on whom a request for admissions is served cannot admit to the truth of the matter asserted therein, the party can alternatively:

(1) deny the truth of a requested admission;

(2) object on the ground that the request exceeds the permissible scope of discovery;

(3) seek a protective order for any of the reasons listed in FRCP 26(c);

(4) admit part and deny the balance;

(5) qualify his/her admissions and denials as necessary; or

(6) state that after reasonable inquiry the information available to him/her is insufficient to enable him/her to admit or deny.

§ 9.12 Preventing Abuse of Discovery

[1] Certification Requirements

FRCP 26(g) imposes two different kinds of certification requirements on discovery initiatives. It requires an attorney or unrepresented party to certify to knowledge, information or belief, formed after reasonable inquiry, that a disclosure under FRCP 26(a)(1) or (3) is "complete and correct as of the time it is made."

In addition, FRCP 26(g) imposes a certification requirement for discovery requests, responses and objections paralleling that of FRCP 11. By signing such a request or

response, the attorney certifies that the discovery request is not predicated on an improper motive such as harassment or delay, and is not disproportionate to the needs of the case.

[2] Protective Orders

A person served with a discovery request may seek a protective order against such request if it may cause "annoyance, embarrassment, oppression, or undue burden or expense." Discovery may be found unduly burdensome based on the location or condition of the discoveree, and may be unduly invasive when it probes matter that, though unprivileged, is confidential.

In order to cure a burdensome discovery request without the court having to wholly deny it, FRCP 26(c) authorizes protective orders that accomplish the following goals:

(1) restrict the time, place, method or scope of discovery;
(2) require that discovery be sealed and only opened by court order;
(3) limit the disclosure of trade secrets and other business information.

§ 9.13 Sanctions for Discovery Abuses

Under FRCP 37, no party may move for an order compelling discovery or for sanctions without certifying that it has tried in good faith to resolve the discovery dispute with other parties without court action. FRCP 37(b) authorizes sanctions for a failure to comply with an order to compel discovery or equivalent discovery order. Rules 26(g), 37(c) and 37(d), however, permit the imposition of sanctions without an intervening discovery order in some circumstances.

The discoverer may move under FRCP 37(a) for an order compelling discovery either when the discoveree objects to discovery or responds evasively or incompletely. If the motion to compel is granted, FRCP 37(a)(4) requires the court to award the movant attorney's fees and other expenses incurred in making the motion unless it finds that opposition to the motion was "substantially justified." If the motion is denied, the discoveree has a similar opportunity for reimbursement and the court may issue a protective order in his favor.

If a party fails to disclose information required to be disclosed by FRCP 26(a), FRCP 37(c) precludes that party from using the information as evidence at trial. Furthermore, FRCP 26(g) requires sanctions against an attorney or party for violation of its certification requirement. Because most violations of the discovery rules can also be construed as violations of the certification requirement, FRCP 26(g) may encourage federal courts to impose discovery sanctions more often without an intervening order compelling discovery.

FRCP 37(b) sets forth a range of sanctions by authorizing the court to:

- award discovery expenses against the violator.
- deem established facts that were the object of discovery.

- exclude evidence.
- strike all or part of the pleadings.
- hold the violator of a discovery order (other than one for physical or mental exam) in contempt.
- dismiss the action.
- render judgment by default.

Chapter 10
DISPOSITION WITHOUT TRIAL

§ 10.01 Default Judgment

If a defendant fails to respond to a pleading within the time designated for response, he is in *default* and subject to entry of a *default judgment.*

[1] Entry of Default

FRCP 55 authorizes the clerk to enter a default when it appears from the docket or is shown by affidavit of the claimant. *Entry of default* is simply a notation of the fact of default and an interim step towards the entry of a default judgment. FRCP 55(c) authorizes the court in its discretion to set aside an entry of default upon good cause shown.

[2] Entry of Default Judgment

Upon affidavit by a claimant that the relief sought is a liquidated amount, a court clerk may enter a default judgment, pursuant to FRCP 55(b)(1), except where the defaulting party is an unrepresented minor or incompetent or the party has not appeared in the action. Only the court may enter judgment in all other cases. When the defaulting party has previously appeared in the action, notice and possibly a hearing is necessary. Like other final judgments, default judgments are subject to timely post-judgment attack under FRCP 60(b).

§ 10.02 Summary Judgment

[1] Standard for Summary Judgment

Where a party (typically the defendant) believes that there ***exists no genuine dispute of material fact*** that would require determination by a trier-of-fact, he may bring a motion for summary judgment seeking judgment in his favor on some or all claims and defenses as a matter of law. A material fact is an essential element of claim or defense for purposes of summary judgment. A genuine dispute is one which a reasonable jury could resolve against the movant. The standard for summary judgment is whether there can be ***"but one reasonable conclusion."*** [*Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986)]

[2] Burden of Production

A motion for summary judgment may be supported by the pleadings, discovery documents, affidavits, and any other materials that present facts that would be admissible at trial. Hearsay, speculation, conclusions of law, conclusory ultimate facts, and

promises that the necessary evidence will be offered at trial therefore cannot support a motion for summary judgment, even when presented by an otherwise proper affidavit.

If movant meets his burden of production that there exists no triable issue of fact, in order to avoid a finding of summary judgment, the opposing party "may not rest upon the mere allegations or denials" of his pleading but must set forth ***specific facts*** showing that there is a genuine issue for trial. [FRCP 56(e)] Alternatively, the opposing party may ***present an affidavit under Rule 56(f)*** stating why he cannot state specific facts in opposition to summary judgment at the present time, without adequate time for discovery. The reasonableness of plaintiff's request for time is a crucial factor in the exercise of the court's discretion.

If the movant for summary judgment fails to meet his burden of production, the opposing party need not do anything as entry of summary judgment is not proper in the absence of a *prima facie* showing that there is no genuine dispute of material fact.

[3] Disposition and Appeal

If the court finds that the movant has met his burden of production, it may enter judgment on a claim or defense. The court may enter judgment on the issue of liability alone, even though the amount of damages remains for trial.

While summary judgments address the merits, they may not be immediately appealable. ***Summary judgment as to liability alone is interlocutory*** in character and identified as such under FRCP 56(c). Similarly, summary judgment with respect to fewer than all the claims or parties is also not considered final for purposes of federal appeal, although a court may direct entry of a final judgment in such cases in conformity with FRCP 54(b).

§ 10.03 Dismissal or Nonsuit

[1] Voluntary Dismissal or Nonsuit

FRCP 41(a)(1) provides that the plaintiff may dismiss once without leave of court by filing notice of dismissal ***before an answer or motion for summary judgment is served*** upon the plaintiff. Thus, a FRCP 12(b) motion to dismiss the complaint does not cut off plaintiff's right to nonsuit unless the motion is converted into a summary judgment motion by the offer of supporting materials outside the pleadings.

Following service of an answer or motion for summary judgment, plaintiff may voluntarily dismiss only by stipulation of the parties or by order of the court upon such terms and conditions as it deems proper. [FRCP 41(a)(2)]

Unless the court specifies otherwise, an ***initial voluntary dismissal is without prejudice.*** Federal courts are empowered by FRCP 41(d), however, to require a plaintiff who

reinstitutes his action to reimburse the parties for the costs of the previously dismissed action.

Most jurisdictions follow a two-dismissal rule, by which a ***second voluntary dismissal is with prejudice.*** The second thus operates as an adjudication upon the merits with whatever preclusive effect is given judgments by the law of the rendering jurisdiction.

[2] Involuntary Dismissal or Compulsory Nonsuit

Involuntary dismissal or compulsory nonsuit is an analogous remedy for the defendant when the plaintiff fails to prosecute her claims or to obey court rules or orders. Disobedience that would justify dismissal also often consists of litigation delays, or failures to appear, respond or take other required action.

Involuntary dismissals are with prejudice to reinstitution of the action in the same court, unless otherwise provided or unless grounded on failure of the plaintiff to meet any precondition set forth in FRCP 41(b): jurisdiction; proper venue; or joinder of a party under FRCP 19. A dismissals based on a plaintiff's failure to satisfy such preconditions does not operate as an adjudications on the merits.

§ 10.04 Alternative Dispute Resolution

Among the ADR devices now used in addition to traditional settlement negotiation are:

Mediation – A neutral third person (the mediator) assists the parties to arrive at a mutually satisfying, self-determined solution.

Arbitration – A neutral third person (the arbitrator) proactively considers the case and designates a winner. Whether parties are required to submit to arbitration and, if so, whether the arbitrator's decision is binding, depends on the nature of the agreement or prior consent of the parties.

Summary jury trials – Prior to actual trial, parties may summarize their evidence to a small test jury. While non-binding, the summary trial verdict gives the parties a sense of how a real jury would evaluate the evidence and thereby facilitates settlement.

Chapter 11
REMEDIES

§ 11.01 Damages

[1] Compensatory, Punitive, and Nominal Damages

Three types of money damages are available in civil actions:

(1) compensatory – which compensate a party "to make him whole" following injury by the defendant;

(2) punitive – which serve to punish the defendant for conduct that is reprehensible;

(3) nominal – which may be awarded upon a finding for the plaintiff when actual harm suffered is either insignificant or impossible to prove.

There is no constitutionally set maximum ratio of punitive to compensatory damages but the fact finder's discretion to set punitive damages is not unfettered. Due process requires that a jury be given some measure of guidance in determining punitive damages, that an award of such damages be ***reasonable and not grossly excessive***, and that there be opportunity for meaningful appellate review. [*See TXO Prod. Co. v. Alliance Resources Corp.*, 509 U.S. 443 (1993); *Pacific Mutual Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991)]

In *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996), the Supreme Court held that the reasonableness of an award of punitive damages should be evaluated against:

- the ***reprehensibility*** of the defendant's conduct;
- the ***disparity*** between the actual or potential harm suffered and the award; and
- the difference between the punitive award and the penalties authorized or imposed in ***similar cases***.

[2] Costs, Expenses, and Attorney's Fees

Most complaints include court costs as part of the requested recovery.

The federal rules contain a number of expense-shifting mechanisms intended to compensate parties suffering from opponents' litigation abuses and to provide a corresponding incentive for careful and restrained use of civil procedure, e.g., FRCP 21 (regarding the signing of pleadings, motions, and other court papers) and FRCP 37 (discovery abuses).

While attorney's fees are not generally recoverable, certain forms of litigation justify such an award because the litigation is deemed sufficiently within the public interest to warrant shifting of attorney's fees from the prevailing to the losing party as an incentive to suit.

§ 11.02 Equitable Relief; Injunctions

Injunctions are court decrees which control the behavior of the defendant by ordering the defendant either to act or to refrain from acting in a certain way. The procedure for obtaining a final (permanent) injunction is a trial on the merits of the case much like that for a damages remedy. All procedural systems also provide for interlocutory injunctive relief. In federal cases, FRCP 65 authorizes both temporary restraining orders and preliminary injunctions.

§ 11.03 Declaratory Relief

Declaratory judgments determine rights and obligations but do not award remedies. Requests for declaratory judgments are thus sometimes made in tandem with requests for damages or injunctive relief. The real significance of the remedy, however, lies in situations where only declaratory relief is available, such as when a party anticipates suit against him/her and seeks to thwart such suit by seeking a favorable judicial determination of the issue underlying the prospective claim.

Under federal law, declaratory judgments are only available in cases of actual, not hypothetical, controversy. [Federal Declaratory Judgment Act, 28 U.S.C. § 2201] An ***actual controversy*** is one which is "definite and concrete . . . admitting of an immediate and definitive determination of the legal rights of the parties in an adversary proceeding upon the facts alleged." [*Aetna Life Insurance Co. v. Haworth,* 300 U.S. 227 (1937)]

Even when the prerequisites for a declaratory judgment are satisfied, federal and many state courts have considerable discretion to withhold the remedy. Reasons for doing so include inability of the declaratory judgment to end the controversy, the public interest in delaying suit, and existence of a pending and related action.

FRCP 57 extends coverage of the Federal Rules of Civil Procedure to cases under the Declaratory Judgment Act. Thus, parties to a declaratory judgment action have a right to a jury trial, if that right would have existed for a trial of the underlying issue(s).

Chapter 12
TRIAL PROCESS

§ 12.01 Pretrial Conference

[1] Purposes

The overarching aim of the pre-trial conference is to more efficiently manage the course of a lawsuit. To that end, the pre-trial conference seeks to:

(1) clarify issues.
(2) control, expedite and reduce the waste of pretrial litigation generally.
(3) facilitate settlement.

[2] Procedures for Pretrial Conferences

FRCP 16 authorizes one or more pretrial conferences in the judge's discretion. When only one pretrial conference is held, it is usually scheduled after the completion of discovery, shortly before trial, at which point the parties are to specify issues and evidence and to amend the pleadings.

FRCP 16(b) requires the judge to enter a ***scheduling order*** within 90 days after the appearance of a defendant or 120 days after the complaint is served, setting time limits for joinder and amendment, motion practice, and completion of discovery, and (optionally) setting the dates for mandatory discovery, pretrial conferences, and trial, subject to modification for good cause.

Usually the parties will be asked to submit pretrial briefs in which parties state the undisputed facts, identify the disputed facts, summarize legal contentions, and list trial witnesses and exhibits. The parties may also be required to make authenticity objections to proposed trial exhibits and be invited to raise other evidentiary objections that could be ruled upon before trial.

[3] The Pretrial Order and Its Effect

FRCP 16(e) requires the court to enter an order after a pretrial conference to preserve its results. Binding effect is given the pre-trial order, and any ***claims, witnesses and evidence not specified in the pretrial order will generally be precluded from trial.*** The pretrial order can only be modified in order prevent "manifest injustice."

FRCP 16(f) also authorizes the court to punish disobedience of the pretrial order by:

- striking claims or defenses.
- dismissing the action.
- entering a default judgment.
- holding the disobedient party in contempt.

§ 12.02 Jury Trial

[1] The Right to Trial by Jury

The Seventh Amendment of the United States Constitution states that "in suits at ***common law*** . . . the right of trial by jury ***shall be preserved***." In a long line of cases, the Supreme Court has interpreted this clause to refer to common law actions in existence at the time of the amendment's adoption in 1791.

The Seventh Amendment ***does not confer the right to a jury trial in purely equitable actions.*** Thus, in determining whether a constitutional right to jury trial exists for a statutory cause of action in which Congress has not expressly created a right to jury trial, federal courts have been required to determine whether the issue at hand most closely resembles something adjudicated at law or equity in 1791.

The "legal" nature of a claim is to be determined by considering:

(1) the ***origins of the claim*** prior to the merger of law and equity;
(2) the ***remedy sought***; and
(3) the practical abilities and limitations of juries.

[Ross v. Bernhard, 396 U.S. 531 (1970)] However, ***greater emphasis is to be given to the remedy sought.*** [*Tull v. U.S.,* 481 U.S. 412 (1987)] Thus, ***legal claims*** brought in an action that was historically equitable, e.g., interpleader, a class action, or a shareholder derivative suit, may be tried by a jury.

Where a case presents both legal and equitable claims which have issues in common, the trial court must first try the legal claim(s) so as to preserve the right to a jury trial on such issues. [*Beacon Theatres, Inc. v. Westover,* 359 U.S. 500 (1959)]

A party cannot seek to bar a jury trial by couching essentially legal claims to appear as if they exist at equity. In *Dairy Queen, Inc. v. Wood,* 369 U.S. 469 (1962), the Court stated that the right to a jury trial applies "whether the trial judge chooses to characterize the legal issues presented as 'incidental' to the equitable issues or not."

[2] Claiming a Jury Trial

The right to a jury trial is waived by a party that does not make a timely demand for such. FRCP 38(b) requires the demand to be made "in writing at any time after the commencement of the action and not later than 10 days after the service of the last pleading directed to such issue."

[3] Jury Selection

Voir dire is the process by which a jury is selected, and is intended to expose biases or interests of venire members (potential jurors) that would disqualify them for cause.

Usually parties are given unlimited challenges for cause and a limited number of *peremptory* challenges. A peremptory challenge permits counsel to keep persons off the jury without offering a reason, although the Supreme Court has ruled that civil litigants may not use their peremptory challenges to exclude jurors on account of the jurors' race or gender.

FRCP 48 requires a minimum of six jurors in federal civil trials. States differ as to the minimum number of jurors required in state civil trials.

§ 12.03 Burden of Proof

[1] The Burden of Production

A plaintiff must present a *prima facie* case by presenting ***sufficient evidence on every essential element of the plaintiff's claim***. If the plaintiff produces sufficient evidence on those issues to justify submission of the matter to the trier-of-fact, the plaintiff has met his/her initial burden of production. If not, a directed verdict (in state courts) or a judgment as a matter of law (federal courts) may be granted against the plaintiff.

In some cases, once the plaintiff produces sufficient evidence to justify submission of an issue to the trier-of-fact, the burden of production shifts from plaintiff to defendant. Defendant then must produce sufficient evidence to avoid having a directed verdict or judgment as a matter of law entered against him/her.

For some issues (e.g., affirmative defenses), defendant has the burden of production.

[2] The Burden of Persuasion

To meet the burden of persuasion, a party must convince the trier-of-fact (the jury in a jury trial; the judge in a bench trial) of the truth of an issue to a pre-determined level of certainty. In most civil cases, the required standard proof is a ***preponderance of the evidence***, i.e., that the facts are more likely than not as the party contends. (Depending on the issue, the plaintiff or the defendant may have the burden of persuasion.)

However, in some civil cases where interests more significant than money are at stake, e.g., civil commitment, termination of parental rights, and deportation, the plaintiff must persuade by ***clear and convincing evidence***. [*See Addington v. Texas,* 441 U.S. 418 (1979); *Santosky v. Kramer,* 455 U.S. 745 (1982); *Woodby v. INS,* 385 U.S. 276 (1966)]

§ 12.04 Presumptions

A presumption allows the trier-of-fact to infer the truth of a fact based on proof of another fact. A rebuttable presumption exists when a party in establishing one fact is deemed to have established a second, unless another party offers evidence rebutting the presumed fact.

§ 12.05 Judgment as a Matter of Law

Upon the close of a party's case, if the opposing party believes that such other party did not prove his case, he may move for a judgment as a matter of law. Traditionally, when a motion was made at the end of the plaintiff's case, or after both sides had rested but before the jury retired to deliberate, the motion was one for directed verdict. When made following the jury's verdict, the motion was for judgment notwithstanding the verdict (JNOV). Although states retain the distinction, federal law has merged the two motions into one for judgment as a matter of law.

A motion for judgment as a matter of law may be granted if, after a party has been fully heard on an issue, "there is ***no legally sufficient evidentiary basis for a reasonable jury to find for that party*** on that issue." [FRCP 50(a)(1)]

The party seeking judgment as a matter of law must make a motion before the jury retires, specifying "the judgment sought and the law and facts on which the moving party is entitled to judgment." [FRCP 50(a)(2)] If the court does not grant the motion prior to the jury returning a verdict, and the verdict is unfavorable to the movant, he must renew such motion no later than 10 days after the verdict.

In a ***bench trial***, either party may move for judgment as a matter of law after the opposing party has been fully heard with respect to a potentially dispositive issue of fact, and the court may (but need not) enter "judgment on partial findings" at any time it can appropriately make a finding of fact on that issue. [FRCP 50(c)]

§ 12.06 Instructing the Jury

Whether or not the parties request instructions, a judge has the duty in most jurisdictions to instruct the jury on the applicable law. FRCP 51 treats the manner in which jury instructions are to be prepared and given in federal court.

FRCP 51 is typical in providing that a party may challenge instructions on appeal only if he objects before the jury retires to deliberate, "stating distinctly the matter objected to and the grounds of the objection." Appellate courts decide the correctness of instructions *de novo,* but view the instructions as a whole, including any curative instructions, and reverse only for prejudicial error.

§ 12.07 Verdicts

Verdicts in federal civil trials must be unanimous. [FRCP 48] Verdicts may be of three types:

(1) ***general verdict*** – a verdict for one side or another without explanation.

(2) ***special verdict*** – the jury answers a series of short-answer fact questions without rendering a specific verdict; the trial judge then announces a verdict based on the answers in the special verdict. [FRCP 49(a)]

(3) ***general verdict accompanied by answers to written interrogatories***. [FRCP 49(b)]

Both alternatives to the general verdict are within the discretion of the trial judge.

§12.08 New Trial

[1] In General

FRCP 59(a) and many state rules authorize a new trial in appropriate cases. Most grounds for new trial fall into two categories: errors in the jury's evaluation of the evidence; and errors in the trial process, including errors in the law applied.

[2] Errors by the Jury

Jury verdicts may support an order for a new trial if the trial judge concludes that the verdict is excessive, inadequate, or otherwise against the weight of the evidence.

[a] Against the Weight of Evidence

The standard often applied in federal courts for determining whether a new trial is warranted is if:

- the verdict is against the clear weight of the evidence; or
- based upon evidence which is false; or
- will result in a miscarriage of justice

"***even though there may be substantial evidence*** which would prevent direction of a verdict." [*Aetna Casualty & Surety Co. v. Yeats,* 122 F.2d 350, 352-353 (4th Cir. 1941)].

In considering a motion for a new trial, the court does not merely test the verdict for sufficiency, as is the case for motions for judgment as a matter of law, but actually weighs the evidence. Thus, there may be sufficient legal grounds for the verdict but the verdict may still be set aside for a new trial.

[b] Excessive or Inadequate Verdicts

When a motion for a new trial is granted made on an assertion that the verdict is excessive or inadequate, the trial court may conditionally grant the motion by requesting the opposing party to accept remittitur, and in some states, additur.

Remittitur is an agreement by the opposing party (generally the plaintiff) to accept a reduction of the verdict. A party who consents to remittitur waives any right to appellate review of it. [*Donovan v. Penn Shipping Co.*, 429 U.S. 648 (1977)]

Additur is an agreement by the opposing party (generally the defendant) to accept an increase in the verdict. However, additur has been held to be in violation of the Seventh Amendment right to a jury trial and is therefore not available in federal trials. [*Dimick v. Schiedt*, 293 U.S. 474 (1935)] As the Seventh Amendment does not apply to the states, however, additur may be available in state trials.

Another option is for the trial court to grant of ***partial new trial*** limited to the issue of damages when the amount of the verdict has been attacked. In federal court, partial new trial "may not be resorted to unless it clearly appears that the issue to be retried is so distinct and separate from the others that a trial of it alone may be had without injustice." [*Gasoline Prod. Co. v. Champlin Refining Co.,* 283 U.S. 494, 500 (1931)]

In diversity cases, state law controls regarding the standard to apply in determining whether an award is excessive. [*Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415 (1996)]

[3] Trial Process Errors

There are a variety of errors that may taint the trial process. These include judicial errors in instructing the jury or admitting or commenting on the evidence, and misconduct by parties, counsel, witnesses or jurors. The judge has discretion to grant a new trial under these circumstances. However, no verdict may be set aside and new trial granted based on a ***harmless error***. A harmless error is one which does not adversely affect the substantial rights of the complaining party.

§ 12.09 Trial-Level Challenges to Judgments

A party against whom a verdict is rendered may, in addition to appealing, challenge the judgment at the trial level by:

(1) collateral attack (in the case of default judgments);
(2) seek extraordinary relief (excusing the aggrieved party from the judgment); or
(3) amendment of the judgment.

[1] Collateral Attack

Collateral attack may be used to challenge a default judgment. Collateral attack is founded on the principle that, if the plaintiff's choice of forum was so unfair as to violate the defendant's right to due process, defendant's refusal to participate in the action should not preclude him from later challenging the court's personal jurisdiction over him. [*See Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694 (1982)]

[2] Extraordinary Relief

When the time for direct attack on the judgment by motion for judgment as a matter of law, for a new trial or by appeal has expired, a party may still seek extraordinary relief from the judgment by a FRCP 60 motion.

At any time after the judgment a party may seek correction of "***clerical mistakes*** in judgments, orders or other parts of the record." [FRCP 60(a)]

No later than one year from judgment, a party may seek relief under FRCP 60(b) based on:

(1) mistake, inadvertence, surprise, or excusable neglect.

(2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under FRCP 59(b).

(3) fraud, misrepresentation, or other misconduct of an adverse party.

FRCP 60(b) furthermore provides for relief upon motion brought ***within a reasonable time*** where:

(1) the judgment is void;

(2) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or

(3) any other reason justifying relief from the operation of the judgment.

[3] Amendment

Within 10 days of entry of the judgment, a party may make a motion to amend the judgment, pursuant to FRCP 59(e).

Chapter 13
APPEAL

§ 13.01 Final Judgment Rule

[1] In General

In most jurisdictions, an ***entry of final judgment*** is a jurisdictional prerequisite to appeal. Under the final judgment rule, parties can only appeal upon final judgment on ***all claims*** in the action.

FRCP 58 provides for clear determination of entry of a judgment by requiring judgments to be set forth on a separate document, although the appellate court must still determine whether such judgment is final. The Supreme Court has declared that a final judgment "***ends the litigation on the merits*** and leaves nothing for the court to do but execute the judgment." [*Catlin v. United States,* 324 U.S. 229 (1945)]

[2] Finality in Multi-Claim and Multi-Party Cases

Because literal application of the final judgment rule in cases involving multiple claims or parties would prohibit appeal of decisions on individual claims until all have been decided, perhaps delaying an appeal for years, FRCP 54(b) authorizes the trial court in multi-claim actions to make "express direction for the entry of judgment" on fewer than all of the claims or parties upon "express determination that there is no just cause for delay."

FRCP 54(b) applies to trial court decisions that ***would have been appealable final judgments standing alone***, but for the liberal joinder permitted by the federal rules. A threshold issue on appeal is whether the trial court has finally disposed of ***an individual claim*** in a multi-claim or multi-party case ***or merely one of several legal theories*** or alternative requests for relief on a single claim.

§ 13.02 Statutory Interlocutory Appeal

[1] As of Right

An exception to the final judgment rule is the appealability of certain interlocutory orders that may have immediate and irreparable consequences. Under federal law, interlocutory orders granting, modifying, refusing or otherwise affecting ***injunctions*** may receive immediate review prior to final judgment in the case, upon a showing that the order might have a significant, perhaps irreparable, consequence that can be only be effectually challenged by immediate appeal. The statutory provision, 28 U.S.C. §1292(a)(1), applies to permanent and preliminary injunctions; it is unclear whether interlocutory appeals extend as well to temporary restraining orders.

The federal statute also makes immediately appealable orders appointing receivers, or refusing to wind up receiverships or to direct sales or other disposals of property. [28 U.S.C. § 1292(a)(2)]

[2] By Permission

Section 1292(b) allows for ***discretionary*** interlocutory appeal when three requirements are met:

(1) the ***trial court*** must have issued an order from which appeal is taken;
(2) the ***trial court*** must exercise its discretion to certify that the order
(a) "involves a controlling question of law as to which there is substantial ground for difference of opinion"; and
(b) "that an immediate appeal from the order may materially advance the ultimate termination of the litigation"; and
(3) the ***court of appeals*** must also agree in its discretion to allow the appeal.

[3] Mandamus and Prohibition

Interlocutory appeal is also available in rare cases where the trial court error may be sufficiently costly to either the parties or the integrity of the judicial system, warranting immediate appeal even without irreparable harm. In such cases, the appeals court can issue a ***writ of mandamus*** to either order the trial judge to issue an order or fulfill a mandatory duty, or forbid the trial judge from acting in excess of his/her jurisdiction. Mandamus is not a substitute for appeal and is only available when there is ***no other adequate means to attain relief*** from judicial error.

Mandamus may generally be warranted in two situations:

(1) ***Breach by the trial judge of a clear legal duty***, such as when a trial court, on the grounds that it was too busy, abdicated its duty to try a case by referring it to a special master, and when a trial court denied a party its constitutional right to a jury trial.

(2) Errors for which appellate review may ***carry broad precedential significance*** for judicial administration. An interlocutory order presenting a question of first impression about the federal discovery rules may justify a kind of supervisory mandamus, on the theory that appellate precedent in such a case can generally improve the administration of justice.

§ 13.03 Collateral Order Doctrine

A judge-made exception to the final judgment rule in federal courts applies for interlocutory orders that are incidental — ***collateral*** — to the merits and that cannot be effectively preserved for review on appeal from a final judgment. In *Cohen v. Beneficial Industrial Loan Corp.,* 337 U.S. 541 (1949), the Court recognized "claims of right separable from, and collateral to, rights asserted in the action, too important to be denied

review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated."

In *Coopers & Lybrand v. Livesay,* 437 U.S. 463, 468 (1978), the Court imposed three requirements for invocation of the collateral order doctrine. The order must:

(1) ***finally and conclusively*** determine the disputed question;

(2) resolve an important issue completely ***collateral to the merits***; and

(3) ***be effectively unreviewable*** on appeal from the final judgment, so that the "opportunity for meaningful review will perish unless immediate appeal is permitted."

Some courts have furthermore imposed an ***"importance requirement"*** for collateral order appeals. Without specifically endorsing a distinct fourth requirement, the Supreme Court suggested that such "importance requirement" is at least integral to the consideration of whether an issue is "effectively unreviewable" by stating that "whether a right is 'adequately vindicable' or 'effectively reviewable,' simply cannot be answered without a judgment about the value of the interests that would be lost through rigorous application of a final judgment requirement." [*Digital Equipment Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 878-879 (1994)]

§ 13.04 Scope of Review

The scope of review is restricted to errors that are:

(1) ***prejudicial –*** Errors alleged must have been harmful to the appellant in the sense that they may have ***materially contributed*** to the adverse part of the judgment. (The harmless error doctrine, which allows courts to disregard errors so long as they do not "affect the substantial rights of the parties," is codified in FRCP 61 and 28 U.S.C. § 2111.)

(2) ***preserved below –*** A party seeking appellate review must preserve the error in the record by ***making timely objection***; failure to do so is tantamount to a waiver for purposes of reviewability on appeal. In the federal system objection need not take the form of formal exception, provided that the party makes known to the trial court what action the party desires the court to take or the general grounds for the party's objection. However, creation of a strong record for appeal frequently ***requires more than cursory objection***.

(3) ***presented above –*** An appellant must ***identify and present the issue*** in an appellate brief. Aside from questions of subject matter jurisdiction, the court will not search the record for error.

§ 13.05 Standards of Review

[1] Questions of Law; De Novo Review

Appellate courts consider questions of law *de novo*, i.e., by reviewing the matter anew and freely substituting its judgment for that of the lower court where necessary. Questions of statutory intent, sufficiency of a defense, adequacy of jury instructions, admission of evidence, and choice of law are typical questions of law. In addition, trial motions granted "as a matter of law" – e.g., motions to dismiss for failure to state a claim, summary judgment, and judgment as a matter of law – are reviewed *de novo*.

De novo review may also apply to limited issues that are not strictly questions of law, e.g.:

(1) questions regarding ***whether undisputed facts satisfy the rule of law*** applied in the case.

(2) largely factual questions, resolution of which may have ***significance in other cases***. [*See Bose Corp. v. Consumers Union of United States, Inc.,* 466 U.S. 485 (1984)]

(3) ***awards of punitive damages*** with regard to whether it is constitutionally excessive. [*Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 121 S. Ct. 1678, 1683 (2001)] The imposition of punitive damages is not deemed factual but rather an issue which is subject to substantive limits imposed by the Due Process Clause.

[2] Judicial Findings of Fact; Clearly Erroneous

FRCP 52 provides that judge-made findings of fact, "whether based on oral or documentary evidence, shall not be set aside ***unless clearly erroneous,*** and due regard shall be given to the opportunity of the trial court to judge of the credibility of witnesses."

The Supreme Court has clarified that a finding is clearly erroneous "when although there is evidence to support it, the reviewing court on the entire evidence is left with a ***definite and firm conviction that a mistake has been committed***." [*United States v. United States Gypsum Co.,* 333 U.S. 364, 395 (1948)] The standard is not met simply because the appellate court would have decided the issue differently.

As reflected in the language of FRCP 52, there is a stronger presumption that the trial court's finding of fact is correct when based on ***oral evidence*** than when it is based on documentary evidence. A strong presumption also exists when the trial was protracted and complex. The strength of these presumptions is based on the theory that the trial judge is in a better position than the appellate court to render findings of fact due to the trial judge's opportunity to evaluate the credibility of witnesses and more extensive exposure to the evidence. The trial court's comparative fact-finding advantage diminishes when the evidence is entirely documentary and the trial short and simple.

[3] Discretionary Trial Court Orders; Abuse of Discretion

The standard for reviewing discretionary orders by trial courts – e.g., decisions regarding scheduling, amendment by permission, complex joinder, consolidation and separation of claims for trial, order of discovery, order of proof, and FRCP 11 and 37 sanctions – is ***abuse of discretion*.**

[4] Jury Findings of Fact; Reasonableness

A jury's findings of fact are given deference, and the standard of appellate review is whether a ***reasonable jury*** could have reached the same verdict.

[5] Findings by Administrative Agencies

Similarly, statutes subject many administrative agency findings to a ***reasonableness*** standard. Many administrative agency findings are given weight because of the agencies' expertise in specific areas of factual determination.

Certain substantive decisions of some administrative agencies, typically mass justice benefit determinations by social service agencies, have been statutorily made ***final and not subject to review*** outside the agencies. Such designated administrative decisions are numerous, lack precedential importance, and subject to a reliable adjudicative process by the agencies. Nevertheless, such statutes do not preclude review of associated issues of procedure, regulatory authority, and constitutional law, which are less likely to flood the federal courts and which may carry precedential value.

Chapter 14
FINAL JUDGMENTS

§ 14.01 Claim Preclusion

A ***final judgment on the merits*** precludes the ***same parties*** (and those closely related to them) from litigating the ***same (or a sufficiently similar) claim*** in a subsequent lawsuit.

[1] Identical Parties

The doctrine of claim preclusion includes an ***"identity-of-parties***" requirement. In addition to the actual parties in the prior adjudication, persons or entities not named in the original case may be subject to claim preclusion if they are sufficiently related to original parties, i.e., ***if they are in privity to the litigants***. [E.g., *Federated Department Stores, Inc. v. Moitie,* 452 U.S. 394 (1981)]

Non-parties to a litigation who are in privity to a party are deemed to have had their interests represented in the prior action, or are deemed to have no greater interest than did the losing party in that action.

"Strangers" – those neither parties to, nor in privity with, nor otherwise involved with the prior adjudication – can neither bind nor be bound by claim preclusion.

[2] Identical Claims

Claim preclusion is founded on an expanded concept of a "claim" which ***encompasses all of the alternative legal theories and the full scope of damages or other remedies*** generated by the facts of the original controversy. It is irrelevant whether the claim was actually asserted in the prior case, as long as it *could* have been. [*Commissioner of Internal Revenue v. Sunnen,* 333 U.S. 591 (1948)]

Many jurisdictions apply the transaction test set forth in *Restatement (Second) of Judgments* § 24 in order to determine if a claim should be precluded. Section 24 defines the claim precluded by the judgment to include "all rights of the plaintiff to remedies against the defendant with respect to all or any part of the transaction, or series of connected transactions, out of which the [original] action arose."

[3] Final Judgment on the Merits

A lawsuit cannot have preclusive effect until it has been ***reduced to final judgment***. [*Restatement (Second) of Judgments* § 13 (1982)] Federal courts regard their judgments to be final even if the case is under appeal. In contrast, some state systems do not give finality to their judgments as long as there is a possibility that the outcome will be changed through appeal.

Only ***judgments on the merits*** are entitled to claim-preclusive effect. Judgments in favor of the plaintiff are considered to be on the merits, even if the judgment was rendered by default, stipulation between the parties, or summary judgment.

Judgments on the merits for defendants have the same preclusive effect. However, defendants may obtain judgments in their favor on grounds other than the merits, e.g., lack of personal or subject matter jurisdiction, or improper venue. Orders dismissing such cases are not judgments on the merits and thus do not have claim-preclusive effect. [FRCP 41(b)]

§ 14.02 Issue Preclusion

The doctrine of issue preclusion (or collateral estoppel) provides that a final judgment precludes relitigation of the ***same issue of fact or law*** if:

(1) the issue was ***actually litigated, determined and necessary to the judgment*** in the prior adjudication; and

(2) the circumstances of the particular case do not suggest any reason why it would be unfair to invoke the doctrine.

Issue preclusion usually ***does not carry the identity-of-parties requirement*** found in claim preclusion, but due process protects genuine strangers to the original litigation from being bound by issue preclusion.

[1] Identity-of-Issues

Issue preclusion (collateral estoppel) can operate only if the legal or factual issues in the original and succeeding proceeding are identical [*Restatement (Second) of Judgments* § 27 (1982)], and "where the controlling facts and applicable legal rules remain unchanged." [*Commissioner of Internal Revenue v. Sunne,* 333 U.S. 591 (1948)]. A litigant may not escape issue preclusion by couching issues to appear new, even if he can demonstrate that differences in factual support or legal argument might cause the issue to be resolved differently in the succeeding case.

[2] Actually Litigated

Issue preclusion bars relitigation of only those matters that were actually litigated and determined in the prior case. Issues determined in a prior action by motion, such as for dismissal based on failure to state a claim, for judgment on the pleadings, summary judgment, or directed verdict may in fact be raised and tried in future litigation. [*Restatement (Second) of Judgments,* note 116, § 27, comment d]

[3] Necessary to Judgment

Issue preclusion does not apply to issues that were not necessary to the judgment as such issues are generally not appealable. [*Restatement (Second) of Judgments,* § 27, comment h]

When alternative issue determinations support the judgment, preclusion is also inapplicable since the judgment is not conclusive with respect to either issue standing alone. [*See Restatement (Second) of Judgments* § 27, Comment (i)] However, the *Restatement* regards such determinations as preclusive if both grounds are affirmed on appeal.

[4] Fairness

Issue preclusion in a given case may be deemed unfair where:

(1) it was ***not sufficiently foreseeable*** at the time of the initial action that the issue would arise in the context of a subsequent action; or

(2) the party sought to be precluded ***did not have an adequate opportunity or incentive*** to obtain a full and fair adjudication in the initial action.

[*Restatement (Second) of Judgments,* note 116, *supra,* § 28(5)]

[5] Nonmutual Preclusion Doctrine

Under due process principles, ***a stranger to a litigation cannot be bound by its judgment.*** [*Parklane Hosiery Co. v. Shore,* 439 U.S. 322 (1979)] However, strangers to a prior litigation may be able to invoke issue preclusion against those who were parties, unless it appears unfair to do so (the ***"nonmutual preclusion" doctrine***).

In *Parklane Hosiery,* the Supreme Court stated that ***non-mutual preclusion should be denied when***:

(1) sought by one who deliberately bypassed an opportunity to participate in the prior action;

(2) the stake of the party against whom preclusion would be invoked was deceptively small in the prior action;

(3) the subsequent proceeding affords significantly more advantageous procedural opportunities for that party; or

(4) there were inconsistent prior judgments.

Furthermore, *Restatement (Second) of Judgments* § 29 makes clear that issue preclusion is unavailable if the party who would be bound "lacked full and fair opportunity to litigate the issue in the first action or other circumstances justify affording him an opportunity to relitigate the issue."

A minority of jurisdictions apply the ***mutuality doctrine,*** precluding strangers from using issue preclusion to its advantage against a party to the prior litigation.

§ 14.03 Full Faith and Credit

The principle of full faith and credit requires that a judgment be given as much effect where presented for enforcement as it would have had where rendered. Full faith and credit obligations appear in the Full Faith and Credit Clause of the United States Constitution [Article IV, § 1] and in the full faith and credit statute, 28 U.S.C. § 1738.

[1] State Judgments in Sister-State Courts

Except in child custody cases, the Full Faith and Credit Clause and statute impose on state courts the requirement to ***honor the judgments of sister-states*** as they would have been applied in the state that rendered the judgment.

[2] State Judgments in Federal Court

The full faith and credit statute imposes upon federal courts an obligation to recognize and enforce the judgments of state courts.

Federal courts must give the same preclusive effect to a prior state court judgment that it would receive in the state in which it was rendered. [A*llen v. McCurry,* 449 U.S. 90, 96 (1980)] Federal courts may not give any more preclusive effect to state court judgments than they would have under the law of the rendering state. [*Marrese v. American Academy of Orthopaedic Surgeons*, 470 U.S. 373 (1985)]

[3] Federal Judgments in Other Federal Courts

A federal statute, 28 U.S.C. § 1963 provides that for judgments "for the recovery of money or property" "judgment so registered shall have the same effect" as if it had been rendered ***where registered***, suggesting that the law of the federal circuit where the federal judgment is presented for enforcement will control.

[4] Federal Judgments in State Courts

Neither the Full Faith and Credit Clause of the Constitution nor the full faith and credit statute [28 U.S.C. § 1738] makes provision for federal judgments in state court. However, in a series of decisions, the Supreme Court filled the gap by reading the full faith and credit statute to ***require state courts to respect federal judgments***. [*E.g., Embry v. Palmer,* 107 U.S. 3, 9-10 (1882); *Stoll v. Gottlieb,* 305 U.S. 165, 170 (1938)]

Federal question judgments have effect under federal preclusion doctrine. The preclusive effect of federal diversity judgments must be determined by the intramural preclusion law of the state where the federal court rendering the judgment was sitting. [*Setek Int'l Inc. v. Lockheed Martin Corp.*, 531 U.S. 497 (2001)]