1. **Selecting the Proper Court**
   1. Requirements
      1. Subject matter jurisdiction
         1. Background
            1. Federal courts are of limited jurisdiction, set forth in Article III § 2

Cases based on nature of the claim

Federal Question\*\*\*

Foreign relations

Admiralty

Cases based on nature of the parties

U.S. a party

Between different states

Between a state and citizens of another state

Diversity\*\*\*

Land grant claimants claiming land of another state

Alienage

* + - * 1. 11th Amendment also narrows:

Unless state has waived its sovereign immunity, cannot be sued in federal court by anyone except a sister state, US, or foreign nation.

* + - * 1. But statutes limit SMJ to narrower
        2. State courts have concurrent jurisdiction unless Congress says otherwise.
      1. Federal Question original jurisdiction
         1. 2 Main Types:

General federal question statute: 28 USC § 1331

OR specific statutes such as 28 USC § 1338

* + - * 1. “*Arising under*”: Well Pleaded Complaint Rule (Mottley)

Federal issue must appear on the face of P’s complaint.

Can’t obtain jurisdiction by anticipating defenses and pleading them in complaint.

In situations of equitable relief (e.g., declaratory), the rule applies to the hypothetical pleading P would bring.

* + - 1. Diversity and Alienage – § 1332
         1. Statutory Examples

§ 1332 (a)(1): NY + NJ v. DE

Requires complete diversity

§ 1332 (a)(2): NY + NJ v. France + France

Requires complete diversity

Ambiguous because of problem of how to pluralize “citizens of a state”

§ 1332 (a)(3): NY + NJ v. France + DE

May *not* require complete diversity (Hodgson v. Bowerbank, Strawbridge v. Curtiss).

* + - * 1. Diversity Citizenship – ONLY ONE DOMICILE AT A TIME

Basics

To be a citizen of a state, one must be domiciled there and be a US citizen (Browne v. Keene).

BUT, domicile is irrelevant for foreign citizens.

Aliens admitted to US for permanent residence deemed citizens of that state in which domiciled.

Citizenship determined at the time of commencement.

Types

Citizenship of natural persons (Baker v. Keck)

Dwelling place location

Community participation

Political participation

Economic activity

Testimony

Citizenship of corporations (§ 1332(c))

Every state in which it is incorporated AND

Principal place of business (“*nerve center*”)

Citizenship of unincorporated associations

Citizen of each and every state and country of which one of its members is actually a citizen

* + - * 1. Critiques and Reasons

Prejudice against out-of-state litigants

Harmony among the states

Encourage interstate commerce

BUT, fears are largely misplaced.

* + - 1. Removal – § 1441
         1. Requirements:

(a) Federal DC must have original jurisdiction (beware of WPC rule)

(b) All defendants *must* agree

(c) No defendant in a *diversity* case can be citizen of state in which action filed (not true for federal question case).

* + - * 1. Mechanics – § § 1446-1450

Normally within 30 days of receipt of complaint

Files notice of removal subject to Rule 11 and gives notice

* + - * 1. Contains own venue provision
    1. Notice and opportunity to be heard: Rule 4 service provisions
       1. Formal requirements – 4(a)
       2. Copy of summons must be served with complaint – 4(c)
       3. Manner of service – 4(e)-(j)
       4. Waiver by mail – 4(d) (*foster cooperation*?)
    2. Personal (territorial) jurisdiction
       1. Need sufficient connection between litigation, object of litigation, and court
       2. Rule 4(k) prescribes the reach of federal courts for most cases.
       3. 14th Amendment DP clause constrains state courts.
       4. Service of process is means for perfecting or asserting jurisdiction.
       5. Traditional Basis: presence in state at time of service, consent
       6. Modern basis: domicile and in-state activities or in-state effects
    3. Venue – 28 U.S.C. § 1391
       1. Basic Rule
          1. Where any D resides if all Ds in same state *or*
          2. Where substantial part of events/property took place/are
          3. Effectively waived if blocked from every federal court
       2. Ask in which of the 91 federal DC action may be brought
       3. Restrictions are *geographic*
       4. Grounded in notions of convenience and fairness to D
       5. For corporations and foreign citizens, venue is anywhere!
       6. If not asserted at the proper time, venue issues are waivable under Rule 12(b).
  1. What law gets applied?
     1. 4 Big Questions:
        1. Is there a FRCP, FRAP, Federal Statute, or US Constitutional provision broad enough to cover the same matter as the putative conflicting state law or practice?
        2. If yes, does federal or state law control, and why?
        3. If there is no positive federal law, does the federal court have power, consistent with Erie, to create and apply federal common law?
        4. If yes, then does federal or state law control and why?
     2. Erie
        1. Formula
           1. X = State interest; Y = Federal interest: Z = Outcome determinative effect
           2. Apply state law where X+Z > Y
        2. Example of clash between mechanical jurisprudence & interest balancing
        3. Klaxton: DC must apply choice of law rules of forum state (get rid of forum shopping) (***horizontal***).
        4. Guaranty Trust Co. v. York: SOL
           1. Outcome determinative test (using Erie underlying) (even though procedural…)
           2. Problems – Seems to have displaced FRCP (what’s NOT OD?)
           3. *REFINED VERSION (LATER): ASK DOES IT AFFECT THE WAY PARTIES LITIGATE OR THE WAY THE CASE IS DECIDED???*
        5. Bernhardt v. Polygraphic Co. of America (**example**)
           1. When fed court can ignore state law

Later authority from VT courts in conflict with old law, lower state court decisions questioning old law, legislative movements to change old law.

Grossly outdated and not in step with sister states

* + - * 1. UPSHOT: Sit as a court in the state and decide the context of law in the same way a state court judge would!
      1. Byrd v. Blue Ridge
         1. 3 Step Analysis

Is the state practice bound up with rights and obligations in such a way that its application is required by federal court (substantive-ish)?

Look at the underlying purpose

Is it just a “form and mode”

York outcome-determinative test

Federal interest in uniform application of state law, even in matters of procedure where failure to apply state law would substantially affect litigation.

Assume here that outcome would probably be substantially different.

BUT another federal interest in applying FRCP under 7th amendment so go to jury! (Countervailing considerations)

Balancing Test

Considering *actual* outcome determinative effects

Likelihood of different result in a jury trial as opposed to judge trial is not so strong as to oppose other interests.

* + - * 1. Apply fed when fed interest is greater than i + ii
        2. Sensitive – Sharp departure from mechanical York
        3. BUT Problems! No objective scale and difficult to apply
      1. Hanna v. Plummer – Tries to answer the subjective problems of Byrd
         1. 1st: Is there a FRCP on point that conflicts with state rule or practice?

If yes, federal rule governs because REA applies (under Sibbach).

Provided that it is valid under Constitution and REA

So long as rule *really regulates procedure*

* + - * 1. If no federal rule on point:

Erie still governs (but seems to abandon Byrd, largely denigrating the state interest element).

USE the TWIN AIMS of Erie!

Discouragement of forum shopping

Avoidance of inequitable administration of state laws

SO, refined OD test

* + - 1. BUT, sometimes refuse to apply Hanna just to get a good result (outcome value at the price of the process)  Unexplainable under federalism!
      2. Other interpretations of Hanna
         1. Construe FRCP narrowly in plain language to avoid conflict (Walker v. Armco)

Says Rule 3 only applies to time periods in FRCP (not SOL)

BUT AC notes mention SOL! (But could argue outside the scope of REA because substantive)

BUT if Rule 3 doesn’t indicate when, what does??

So, on right hand side  Probably not FS, but inequitable to apply federal law, so apply state law.

Other PROBLEMS:

Hard to reconcile with Hanna’s use of Rule 4(d)(1). In Hanna, read literally for unavoidable clash. Nothing here to say that it should be different.

SO why the difference?

Underlying purpose policy here has strong state substantive interest.

SO NEW REFINED RULE ***Clear Statement Principle***:

If FRCP conflicts a state rule with *substantive* interests, the FRCP will be presumed NOT to apply! (Unless rule says on face in clear language that drafters intended federal rule to apply).

* + - * 1. BUT on the other hand, unlike in Walker, in Burlington Northern Railroad v. Woods, court reads FRAP broadly to find a clash between FRAP rule 38 and state appeal penalty to rule that federal law trumps.
      1. Gasperini
         1. For *federal common law procedure*, York/Byrd is still good law.

Reads Byrd as a balance REGARDLESS of if the law is substance or procedure! (Unlike Erie, which said that, in the absence of federal substantive law, apply state sub law!)

* + - * 1. Commentary:

Some have said court used Byrd balancing, either implicitly or explicitly.

Others have argued that Hanna is still good law, but Hanna calls for narrow interpretation in order to AVOID conflict with state substantive law.

Outside of FRCP, requires Byrd balancing test replaced with Hanna’s twin aims of Erie.

BUT DISSENT is popular too!

Gasperini is just a repudiation of all of the wooden tests and it’s just a judgment call and that exercise calls for comparisons and, in appropriate cases, accommodations for federal and state policies.

* + - * 1. Problem is that Gasperini presents a very difficult Erie class:

Very high federal interest in having federal law apply (federalism, judge/jury balance, etc.)

ALSO very high state interest in having uniform damages

So, difficult to balance

* + - 1. Shady Grove v. Allstate
         1. Seems to say that you read FRCP in a natural normal reading and, if there is a defensible alternative reading that will get rid of conflict, then use it.
      2. Federal Common Law? When should it be created/used?
         1. Federalism Issue: Often displaces state law (usurps state purgatives). BUT, without common law established, state law could frustrate federal interests.
         2. Separation of Powers: Clearly it’s for Congress to decide existence and context of Federal Law. BUT, under certain circumstances, developing fed common law is important for deciding cases and effectuating Congressional intent.
    1. Clearfield
       1. One could argue that issue is substantive, so it seems Erie would require application of state law.
       2. BUT: Held that federal common law should control because of high federal interest in federal $. Based on federal statute!
          1. High federal interest in uniformity of printing money (BALANCING TEST!)
          2. If state law controlled, rights and duties of US viz. $ would be subject to uncertainty and non-uniformity of state law.
          3. SO, even if based on substantive state law, federal common law governs issues for which there is a *sufficiently high* federal interest at stake!
       3. Other cases
          1. United States v. Kimbell

No federal law, so federal courts directed to fill in holes with common law. They choose state law as the common law!

Why?

Need for uniform federal law not present here

Application of state law would not frustrate specific objectives of federal programs.

Applications of new federal rule might disrupt existing commercial relationships predicated on state laws.

UPSHOT – Lets the court avoid a complex problem…

So, if it was hostile, court to search another state.

* + 1. Harmonize?
       1. Not determined by parties or basis of jurisdiction, nor source of rights
       2. Rather, depends on *balancing* of relevant state and federal interests.
    2. Reverse-Erie
       1. Formula
          1. X = State interest; Y = Federal interest: Z = Outcome determinative effect
          2. Apply state law where X > Y+Z
       2. Not a mirror image of Erie though.
          1. Dice v. Akron (FELA)

In a federal claim in state court, federal law controlled even on a procedural issue! (merely “a local rule of procedure”

Here, we used Byrd balancing test, even though procedural.

* + - * 1. Brown v. Western

Again, not symmetrically (if it was in federal court, we’d use federal rule for pleading).

Matter of procedure, but assertion of federal rights (FELA) is not to be defeated by local practice.

* + - * 1. Felder v. Casey

Maybe an explanation for why the tipping towards federal law even in state court claims  *SUPREMACY CLAUSE!*

The N.O.C. interfered with and frustrated substantive rights that Congress created under § 1983 Civil Rights.

*Pre-emption!*

* + - 1. *SO*, Supremacy Clause AND Preemption act as a thumb on balancing scale!
         1. BUT, see also Johnson v. Fankell, where the court seems to largely deny the SC and preemption aspects.

There, though, the rule was a neutral rule, whereas in Felder, it directly frustrated federal law.

Plus, in Johnson, preemption would be very intrusive on state interests! (Much more than in Felder).

* + - * 1. SO, state law/federalism concerns are at their apex when federal law tries to make states do something so huge as restructuring state courts!
    1. Maybe USE THIS FORMULA:
       1. If Erie
          1. Problem from action in federal court under diversity:

Generally requires application of state’s substantive law, whether it is statutory or common law (re-read pg. 2-6, but remember that some procedural rules have substantive purposes).

* + - * 1. BUT, if in federal court under Federal Q jurisdiction or § 1345, then generally apply federal substantive law, *including* common law (Clearfield).
        2. In *either case*, MUST STILL BALANCE Fed & State INTERESTS!
        3. In any event, if there’s a federal statute on point, that law controls regardless (Supremacy Clause) unless unconstitutional.
      1. If *Procedure*  Hanna
         1. If actual conflict between state law and FRCP or FRAP:

Is there REALLY a conflict?

Narrow reading or natural reading? (Shady Grove)

Requires understanding underlying policies of both FRCP and state rule in order to decide if 2 rules really conflict!

* + - * 1. If there is not a rule on point, we also have federal common law! (Controlled by the RDA)

SO WE BALANCE!

Ask whether the twin aims of Erie will be undermined by application of federal law.

If twin aims lead to conclusion that state law should control UH OH revisit analysis of whether or not there really is a forum shopping effect!

\*\*\*KEY\*\*\* 1 out of 2 things: EITHER:

State law should control because federal interest is not significant enough to overcome outcome determinative effect of using fed law instead of state law OR

If fed interest seems to call for application of fed law, but doing so has FS effect, REVISIT analysis of how strong FS really is! Don’t be inconsistent.

1. **Scope of the Litigation**
   1. Claim Joinder Rules
      1. Counterclaims and Crossclaims – Rule 13
         1. Compulsory (a)
            1. Anything arising out of same transaction or occurrence as P’s claim

Can use same evidence explanation

Policy: Efficiency/judicial economy

* + - * 1. If not, precluded under res judicata
        2. BUT, if dismissed under 12(b)(6), no claim, so no compulsory CC
      1. Permissive (b)
         1. Any claim D has against P
         2. BUT court may order separate trial for convenience or to avoid prejudice under Rule 42(b).
         3. Remember, D can still be barred under *res judicata*.
      2. Cross-claim (g)
         1. Again, permissive, but may still be barred by *res judicata*
    1. Joinder of Claims (any party) – Rule 18
  1. Party Joinder Rules
     1. Permissive Joinder
        1. Rule 20
           1. Rights must grow out of same transaction, occurrence, or series and some questions of law or fact must be common to parties.
        2. Rule 21 remedy for misjoinder/nonjoinder
        3. Rule 13(h) additional parties to a Rule 13 claim
     2. Compulsory Joinder – Rule 19
        1. Necessary party – Can’t destroy SMJ (a)
        2. Indispensible party (b)
           1. If joining would destroy SMJ, must decide if parties’ rights will be so affected by absence, then court will try to fashion a way to avoid detriments to rights of parties present and not present.
           2. If it can’t find a way, dismissal.
  2. Special Joinder Rules
     1. Interpleader
        1. Rule Interpleader – Rule 22(a)
        2. Statutory Interpleader – Rule 22(b) and § 1335
     2. Class Actions (Rule 23)
        1. Lots of court intervention and findings judge must make prior to allowance
        2. Seeks to avoid collusion – court certification
        3. Requires approval before any settlement
        4. Worry about individual autonomy and adversary system
        5. Balance efficiency concerns with due process concerns
        6. Furthers social policies (allows a ton of small cases to be collected)
        7. *Must be adequate representation!* (Hansberry)
     3. Shareholder’s Derivative Actions (Rule 23.1)
     4. Intervention – Rule 24
        1. Statutory Intervention as of Right (a)(1)
        2. Rule Intervention as of Right (a)(2)
        3. Permissive Intervention – discretion of the court (b)
        4. Common in class actions
     5. Impleader (TPD) – Rule 14

1. **Phases of the Lawsuit**
   1. Pleading
      1. History
         1. Old was highly stylized common law or rigid code system.
         2. Old pleading for notice AND facts (writs)
      2. Stating the Claim – Rule 8(a)
         1. Notice pleading (8(a)(2))
         2. Grounds of Court’s jurisdiction (8(a)(1))
         3. Demand for relief (8(a)(3))
         4. Detailed fact pleading not required (merits) (8(e); Conley v. Gibson)
         5. After Twombly/Iqbal, “nonconclusory plausible” pleading (notice+)
            1. 2 Steps:

Remove conclusory legal arguments (allegations that contain little more than elements of legal claim at issue).

Weigh remaining facts and determine if sufficient to render P’s claim *plausible*.

* + 1. Statement of Claim in the Alternative – Rule 8(d)
       1. Purpose – Assist P who is uncertain about what facts he is able to prove or what substantive law to apply
       2. May state as many separate claims or defenses, even if inconsistent
    2. Pleading Special Matters – Rule 9(b)
       1. For fraud & mistake (abused & difficult to prove), must be particular.
       2. May allege generally malice, intent, and other mental conditions
    3. Signature and Certification – Rule 11
       1. Applies to every pleading, motion, and paper filed
       2. Must be signed by attorney of record, or party if *pro se*
       3. Purpose: Stop, think, and investigate
       4. Reasonable inquiry standard
       5. Sanctions available
       6. Notice, safe harbor provision; opportunity to be heard
       7. Murphy v. Cuomo
          1. Rule 11 used as counterrevolution to notice pleading, closes doors to claims with little factual or legal support.
          2. BUT, discourages novelty and encourages more sanctions litigation.
    4. Defenses and Objections
       1. 3 Categories:
          1. Denials (8(b)-(d))
          2. Affirmative Defenses (Rule 8(c))
          3. Rule 12(b) Defenses:

3 Groups

Disfavored: (b)(2)-(5)

Waived in 3 circumstances

Make pre-answer motion and omit

Make no motion but omit from answer

Not included in amendment as matter of course (15(a))

Why? D should know (not on merits)

Favored: (b)(6)

Specially favored: (b)(1)

Waiver and consolidation rules: 12(g)-(h)

Timing: Rules 12(a)(1) and (4); Rules 6(a) and (b)

* + - 1. Objections
         1. Motion for a more definite statement – 12(e)
         2. Motion to strike – 12(f)
      2. Responding to Defenses
         1. For P

Under 7(a), not allowed to respond unless ordered to

Under 8(b)(6), when not required to respond, D’s allegations are denied.

* + - * 1. For D

P’s factual allegations are taken as admitted if P does not respond to them.

* + 1. Rule 7(a)
       1. Lists 7 types of pleadings allowed
       2. All either complaint or answers, except (7) allows for reply if court orders
       3. No other pleadings allowed (no Ping-Pong pleading)
    2. Motions and Other Papers – Rule 7(b)
    3. Amendments to Pleadings – Rule 15
       1. Liberal amendment allowance
          1. Judicial efficiency, fairness, and working against prejudice
       2. Timing considerations before trial (15(a))
       3. Amendments to conform to trial so pleadings conform to evidence (15(b))
       4. Relation-back doctrine (15(c)(1)(A)-(B))
          1. Attempt to save P from running the SOL due to pleading errors
          2. Compromise: So long as D has notice of claim within SOL and that claim is based on same transaction or occurrence as the amended claim, then good! Not unfair surprise!
          3. If meets requirements, treated as if pleading was filed during time of original pleading
  1. Disclosure/Discovery: Rules 26; 30-37; 45
     1. Purposes
        1. Relationship to modern pleading
        2. Prevent trial from being a drama of surprises  MERITS
        3. Efficient presentation and resolution of controversies
     2. Starts with discovery conference to discuss plan submitted to court – 26(f)
        1. Good faith requirement to come up with plan
        2. Discovery cannot normally start until after conference (26(d)(1))
     3. Within 14 days of conference: Mandatory Disclosure – Rule 26(a) (1993 AC)
        1. Early, informal, mandatory exchange of information
        2. Change to the adversarial process – cooperative
        3. 3 Types:
           1. (a)(1): At the outset

Witnesses likely to have discoverable information that disclosing party may use to support its claims or defenses, unless solely for impeachment

Documents, electronically stored info, and other things that disclosing party has in possession, custody, or control and may use to support claims or defenses, unless solely for impeachment

Computation of claimed damages

Insurance agreements that might cover part or all of eventual judgment

Must not be filed until used in proceeding ((5(d))

* + - * 1. (a)(2): At a specified time

Info regarding any expert whom it may call at trial

Most experts must deliver detailed report.

Must not be filed until used in proceeding (5(d))

* + - * 1. (a)(3): Shortly before trial

Witness lists and like regarding non-impeachment

Trial exhibits, etc.

Must promptly file with court.

* + - 1. Must be in writing, signed, and served (26(a)(4))
      2. Certification requirement analogous to Rule 11 (26(g))
      3. What is required?
         1. Scope of individual and document disclosure narrowed in general to information “disclosing party may use to support its claims or defenses”.
         2. Rule 26(a)(1)(E): Duty to disclose is based on information *reasonably available*; must investigate
      4. Why?
         1. It’s the kind of info needed in most cases anyways to prepare for trial or make informed settlement decisions.
         2. Efficiency/time-saving concerns
    1. Discovery
       1. Timing – 26(d)
          1. Typically can’t start until after 26(f) conference ((d)(1))
          2. Can usually progress in any sequence ((d)(2))
       2. Scope – 26(b)(1)
          1. After 2000, allow discovery of any matter not privileged (attorney-client) which is relevant to claim or defense by the party (court permission is not required if within this “narrower” realm).
          2. The broader standard of relation to subject matter (so maybe related to unasserted but possible claims or defenses) can still be available if you establish good cause on motion.
          3. Doesn’t have to be admissible as long as it seems reasonably calculated to lead to discovery of admissible evidence
       3. Limitations – 26(b)(2)-(3)
          1. (b)(2): Case-by-case judicial supervision of duplicative or disproportionate discovery
          2. (b)(2)(B): Limits on discovery of electronically stored information

Ever since Rule 34, courts have held consistently that electronic evidence and info was discoverable.

BUT, problems with sheer volume for complex litigation.

* + - * 1. (b)(3): Work Product Doctrine

2 Major Authorities: Rule 26(b)(3) and Hickman v. Taylor

Rule

2 Types:

Ordinary (26(b)(3)(A))

Opinion (26(b)(3)(B))

Protects documents and tangible things prepared in anticipation of litigation or for trial by party or its representative.

BUT, requesting party has option to show that relevant and non-privileged facts remain hidden in attorney’s files and are indispensible.

Not limited to only attorney-prepared stuff

Hickman

For other work product information (including “intangibles” and in other situations), must rely on principles and policies of Hickman.

* + - 1. Motion to compel/Sanctions – 37 (still good faith effort)
         1. (c)(1) – Disclosure
         2. (d) – Gross Discovery Failure
         3. Steps

Must first confer with uncooperative person

Then, must get directive order

Then, if still uncooperative, must get sanction

* + - * 1. In Rule 35 exams, steps 1 and 2 are irrelevant  go right to step 3.
      1. Protective orders – 26(c)
      2. Supplementing Prior Disclosure and Discovery – 26(e)
         1. Compromise between busy practice & need for accurate discovery
         2. Duty to supplement *only* when he learns of incorrect or incomplete
      3. Use of disclosure discovery products at trial – Rules 32, 33(c), 36(b)
         1. Use of depositions – Rule 32

Big barrier is hearsay.

Some exceptions such as unavailability

* + - * 1. For other forms of discovery, generally ok as long as under FROE (e.g., Rule 33(c)
      1. Discovery Devices
         1. Depositions

Oral – Rule 30

Scope

Any party or nonparty within Rule 26

*No application of law to facts*, because generally layman without law knowledge

Mechanics

Like taking testimony at trial, but can sometimes be taken remotely (30(b)(4))

No judge present

For nonparties

Subpoena summons nonparty to be deposed.

Under 45(a)(1), subpoena duces tecum may command nonparty to produce documents and things.

Geographic limit – 45(c)(3)(B)(iii)

For parties

Subpoena not necessary, because the notice (30(b)) counts as the command.

Under 30(b)(2), request to produce documents and other things may accompany notice to party deponent.

Objections – Rule 30(c)

Within scope but objectionable: Answer question and objection will be recorded and, if used at trial, objection is renewed (30(c)(2) 32(b)). But can’t raise objection for first time at trial if it could have been obviated during deposition (32(d)(3)(A)).

Protected under privilege: Probably only time you shouldn’t answer

Advantages

Immediate without chance to rehearse

Flexible – Frame questions as you go along

Preview of cross-examination

Disadvantages:

EXTREMELY EXPENSIVE

Force other side to prepare thoroughly

Educate witness for trial

Written Questions – Rule 31

Seldom used

Deponent responds orally.

Advantages

Less expensive because counsel not present

Useful for certain situations (e.g., simply to authenticate a document, simple facts, or distance outweighs cost/benefit)

When addressed is nonparty (interrogatories only for parties)

Disadvantages

Cumbersome – Not suited for complicated or searching inquiries

Can’t ask follow-up questions (inflexible)

More expensive than interrogatories

* + - * 1. Interrogatories – Rule 33

Can only be addressed to parties

Answers not necessarily binding if inconsistent with future evidence (can only work with what they have at the time). Up to finder of fact to weigh contradictions (Freed v. Erie).

Scope  Wider than depositions

Opportunity to confer with counsel distinguishes them.

*May apply law to facts* (33(a)(2))

*No questions of pure law*

No obligation to investigate in order to obtain information outside of control (O’Brien v. IBEW)

Mechanics

Limited number of written questions – 25 (33(a)(1))

Responding party writes response with counsel.

Objections

Same as under 26(b)(2)(c)

Also under 26(b)(1) – Privilege or irrelevancy

Advantages

CHEAP!

Narrow issues to matters that are seriously in dispute

Details from vague pleadings

Get names and addresses of people with info

Discredit the witness (use with deposition)

Disadvantages

Time to ponder and answer carefully

Assistance of counsel

Inflexible

Can’t deal with attempts at evasion

* + - * 1. Document production and inspection of things – Rule 34

Also includes ability to enter property

Parties: 34(a)

Nonparties: 34(c)

Disadvantages

Can be expensive for both sides

Must produce/request

* + - * 1. Physical and mental examinations – Rule 35

Only for *parties*

*Only discovery device that must be initiated by motion addressed to court*

Schlagenhauf v. Holder

Requesting party has discriminating burden to show cause and mental or physical condition in controversy.

Can be applied to Ds too if in controversy.

Possible worry about blackmail (trying to find anything wrong with D – so weigh pain & danger against utility)

* + - * 1. Request to admit – Rule 36

Served upon *parties*

Only Admissions are conclusively binding under 36(b).

Must make reasonable inquiry (ignorance not excuse)

Least used discovery device

Skeptical belief that truthful binding answers won’t be useful

Primarily as means for streamlining trial

* 1. Pretrial Conferences: Rule 16
     1. Purposes – 16(a)
        1. Give away control that parties exercised over discovery to judge
        2. Seems to contemplate a much larger role for judge in case management, resulting in part from numerous discovery disputes pretrial.
        3. Also, consistent with amended Rule 1 (“administered”)
     2. Steps
        1. Scheduling Order – Rule 16(b)
           1. In most cases, within about 100 days of commencement, court must, after consultation, fix time limits for settling pleadings, filing motions, and completing discovery.
        2. Optional: One or more pretrial conferences to address some of the pretrial concerns of 16(b)
        3. Optional: Final pretrial conference may occur shortly before trial to formulate trial plan – Rule 16(e).
     3. Binding Nature of Orders
        1. Final pretrial conferences may only be modified to prevent manifest injustice – binding!
           1. Burden is on the moving party to show injustice.
           2. No universal test – standard may vary. EX:

Degree of prejudice to nonmoving party if granted

Ability of nonmoving party to cure prejudice

Impact on order and efficiency of trial

Bad faith in the moving party

* + - 1. Effectively supersedes the pleadings and evidence
    1. Authority of judge
       1. Use of conferences varies greatly between districts.
       2. Depends on judge’s temperament and views of their role in litigation
    2. Issues
       1. Coerciveness questions – settlement?
       2. Undermines neutrality?
       3. What can and can’t the court compel? Identiseal Corp v. PIS: Under Rule 16, court can’t compel discovery if party doesn’t want to conduct discovery. BUT, under new 16(a), court may be able to consistent with purposes.
    3. Sanctions – Rule 16(f)
  1. Resolution without Trial
     1. Four Devices: 12(b)(6), 12(c) JOP, 12(f), 56 MSJ
     2. Motion for Judgment on the Pleadings – Rule 12(c)
        1. When?
           1. Either party may move after close of the pleading.
        2. Mechanics
           1. Moving party admits adversary’s factual allegations.
           2. Movant’s allegations not taken as true unless adversary’s pleading has admitted them.
           3. Motion attacks legal sufficiency of adversary’s position.
           4. Only questions of law, never fact!
        3. If party submits and court considers matters outside the pleadings, the motion is treated as a motion for summary judgment under Rule 56 (12(d)).
     3. Motion for Summary Judgment – Rule 56
        1. When?
           1. May be filed at any time until 30 days after close of all discovery
        2. Mechanics:
           1. Movant must show no genuine issue of material fact and, upon resolution of any disputed questions of law, movant is entitled to judgment as matter of law.
           2. Usually supported with materials, not just the pleadings (such as affidavits or discovery), but not necessarily
        3. Standard:
           1. Only if a reasonable trier of fact could not find for the opponent on the factual matter
           2. BUT WE DON’T RESOVLE factual disputes, just see if they exist!
        4. Purpose:
           1. To end the litigation where there are no disputed factual issues and one of the parties is entitled to judgment as a mater of law
        5. BUT NOTE: in Scott v. Harris, SC seemed to impose a lesser burden on moving defendant by holding that “no reasonable jury” could believe P on the record, thus summary judgment appropriate.
  2. Settlement
     1. Decisions on whether or not to settle a case are very subjective, so maybe judges should not be punishing settlement behavior.
  3. ADR
     1. Negotiation
        1. Often non-binding process, but can lead to binding result (requires K)
     2. Mediation
        1. Neutral party facilities discussion
        2. Doesn’t have power to impose solution
        3. Preferred outcome is win-win
     3. Arbitration
        1. Agree to submit dispute to neutral 3rd party and have him decide
  4. Trial Phase
     1. Jury Basics (38, 39, 47, 48)
        1. Jury determines the facts and legal consequences of facts by application of law as judge instructs.
        2. Right to jury trial – Rule 38
           1. Guaranteed under 7th Amendment (does NOT restrict states)
           2. Parties waive right unless party makes timely demand (38(b)-(d)).
        3. Jury Characteristics

Can impanel juries of less than 12, as long as there are at least 6 (Rule 48(a)) (Colsgrove says not against 7th to do so)

Arguments for large juries

Give dissenter an ally

More accuracy/fact catching

Longer deliberation

More representative of the community

Must be unanimous unless otherwise stipulated (48(b))

* + - 1. Jury Selection – Rule 47 and USC § 1861-1869
         1. Random from a fair cross section of community without discrimination on basis of race color, religion, sex, national origin, or economic status
         2. Determine whether good reason exists to dismiss potential juror
      2. Preemptory Challenges
         1. Historically used to get blacks off of juries
         2. BUT, lawyers get around this and just give a disingenuous reason.
         3. Pro: Lets party feel as if process is fair (process value)
         4. Con: They TRY to select a biased jury! So, in the name of fairness, they diminish overall justice.
    1. Rules of Evidence
       1. Purpose:
          1. Filter out unreliable, misleading, or prejudicial testimony
          2. Be sure that evidence is as trustworthy as possible
          3. Policy issues (e.g., privilege)
       2. Main Kinds
          1. Opinion Testimony

By Expert – Rules 702, 703, 705

Judge initially determines expert’s qualifications – 104.

Jury weighs credibility of experts and testimony.

By Lay Witness – Rule 602, 701, 704(a)

Very broad standard (more than common law)

Lets jury weigh credibility/value of testimony opinion

* + - * 1. Real Evidence/Demonstrative Evidence

Introducing party must authenticate all evidence 1st – 901(a).

Authentication 1st question for judge, but jury weighs at end.

“Best-evidence” Rule – 1002

* + - * 1. Judicial Notice – Rule 201

When judge determines that fact is public knowledge, he may just notice it himself and then tell jury.

Save time & expense of proving matters not in dispute

* + - 1. Relevance – 401-403; 407-408
         1. Does it have some rational tendency to make any important proposition of fact more or less likely?
         2. Depends on the number of successive inferences necessary to connect it with the proposition to be proved
      2. Rules Excluding Relevant Evidence
         1. Competency – 601 (state law)

May be invoked as a right by parties whose interests in having the verdict follow the evidence is at stake

Babies, insane people, etc.

Jury still has last word even if judge OKs a borderline.

Harmed party can appeal if testimony erroneously admitted or excluded.

* + - * 1. Privilege – 501 (state law) and 502

Case-by-case balancing analysis

Someone whose outside interests are at stake

Harmed party can only appeal if testimony was erroneously excluded.

* + - * 1. Hearsay

General Rule – 801 and 802

Out of court statement offered in evidence to prove truth of matter asserted in testament (i.e., testimony through the mouth of another)

Why exclude it?

Fact trier needs to be able to evaluate perception, memory, narration, sincerity, etc.

Absence of cross-examination is KEY!

Exceptions: 2 Categories (lots!)

Declarant available, but it doesn’t matter – 803

Present sense impression (803(1))

Excited Utterance (803(2))

Must be very close in time to observation of event

Must be spontaneous and startling

Why? Supposedly suspends declarant’s power of reflection and fabrication

Then existing… (803(3))

Declarant unavailable – 804

Under belief of impending death (804(b)(2))

Likelihood of truth in circumstances supposedly high enough to justify

Concerns death circumstances

Statement against interest (804(b)(3))

Declarant must be unavailable.

Reasonable person wouldn’t have made statement unless believed it to be true.

Admissions by party-opponent (801(d)(2))

Not really exception – exemption

Any statement made by a declarant party which is used against that party

Admissible even if declarant has no basis for knowing truth of statement

Does not have to be against interest

Hearsay within hearsay – Rule 805

Each level must come within a hearsay exception.

* + - 1. Remote, Confusing, and Prejudicial Evidence – Rule 403
         1. Relevant evidence may be excluded if probative value outweighed by danger of unfair prejudice, confusion, misleading the jury, undue delay, time waste, or needless presentation of cumulative evidence.
         2. Similarly: 411 (Insurance), 407 (Repairs), 408 (Settlement)
    1. Order and Method of Proof (Rules 50(a)-(b), 52(c))
       1. For non-jury trials: Rule 52 (many jury proceedings not followed)
       2. Burden of Proof
          1. Generally on party to prove its own respective claims.
          2. P has burden of production to produce sufficient evidence such that it would be rational for jury to decide for P.
          3. If P fails – court will use one of the 3 devices (JMOL/RJMOL/NT)
       3. Burden of Persuasion – Usually preponderance of evidence
       4. Steps
          1. Opening statements (P and then optionally D)
          2. P’s case calling witnesses and then resting case
          3. Motions at the close of P’s case

If P’s evidence is insufficient or lacking on an issue, D may move for JMOL under 50(a).

When?

Anytime before submitting to the jury

Why?

Allow nonmoving party opportunity to correct deficiencies in proof  MERITS!

Prevent irrational verdicts

\*\*\*Same standards as 50(b) and 56\*\*\*

“if court finds that reasonable jury would not have legally sufficient basis to find for” opponent”

Not supposed to weigh evidence

In favorable light to nonmoving party

No discretion, must grant if legal standard met and failure to do so is reversible error.

Must state specific grounds (law and facts)

Broad standard – Can reasonable minds differ?

If judge is satisfied that no jury reasonably considering evidence could find for nonmoving party, *BUT arguable*

Theoretically available even to Ps if case is strong enough and D does not rebut (still issue of jury credibility weight though)

If granted, case removed for jury and judgment entered for D.

* + - * 1. D’s case (if P presented sufficient evidence)

D may rest if sure that P was not good enough for jury or worried that his evidence will backfire.

Ordinarily, though, D will make his case in same way as P.

* + - * 1. Motions at the close of D’s case

P may move for JMOL under 50(a) without waiving right to put in rebuttal evidence if judge does not grant motion.

* + - * 1. P can offer rebuttal evidence.

Generally limited to evidence that meets D’s new facts

Improper to just repeat P evidence for emphasis

Improper to bring up stuff that should have been brought up in main case – BUT judge has discretion

* + - * 1. D can then rebut, and so on…
    1. Submission to the Jury and Verdict
       1. Jury Instructions – Rule 51
          1. Parties may request instructions.
          2. Objections – 51(c)

Must be made on the record, specific, and give grounds

Why? Give trial court chance to fix error before it’s too late.

* + - * 1. Preserving the right to appeal (AC notes)

Proper request for instruction not enough – must also renew by objection (51(d)(1))

BUT, if plain error (obvious mistake) ((d)(2)) appellate reviewing can still review *even if not objected to*!

* + - 1. Verdict – Rule 49
    1. Post-verdict Motions
       1. RJMOL – Rule 50(b)
          1. Must have previously filed JMOL under 50(a) – That way court is just reserving judgment, sidestepping 7th Amendment concerns
          2. No later than 28th day after entry of judgment
       2. NT – Rule 59
          1. Basis – Any basis for NT at common law
          2. Judge has *discretion*.
          3. KEY GROUND – When jury verdict is against weight of evidence

When judge is clearly convinced that jury was wrong in deciding the way it did – so can grant even if thinks rational jury could reach decision it did

Courts weigh all evidence, even the credibility of witnesses.

Grants when views verdict wrong, even if some balancing of evidence he needs to do, including witness credibility.

7th Amendment criticism, BUT NT still includes new jury, so not really usurping

* + 1. Judgment Rule 54
       1. Should award whatever relief entitled to, even if party has not demanded such relief
    2. Default Judgment Rule 55
  1. Special Kinds of Equitable Relief
     1. Declaratory Judgment
        1. Court’s declarations of rights and duties of parties
        2. Sources:
           1. Rule 57
           2. § 2201 and § 2202
        3. Must be actual controversy
           1. Article III § 2 of Constitution – Suggests precluding federal courts from issuing advisory opinions rather than resolution of a case
           2. Must be definite and concrete, touching legal relations of parties having adverse legal interests, real and substantial, *immediacy and reality* – a question of degree (Prasco v. Medics)
           3. BUT, courts are reluctant to invalidate acts of legislature before application by approved agencies (separation of powers) (Local 37).
     2. Injunctions: PI (a) and TRO (b) – Rule 65
        + 1. About:

TRO:

Court may issue before hearing and even without notice to opponent for true imminent emergencies.

Should be promptly followed up with application for PI.

PI: Requires notice to opponent

* + - * 1. Standards/Criteria: 2 Approaches

Sonesta: Either/or balance  Sliding scale

If probable success on merits (strict) AND

Likely irreparable harm (less strict – just P) *or*

If sufficiently serious questions of merits (less strict – fair shot) AND

Hardship balance tipping *strongly* towards P

Posner: Grant PI IFF:

Pharm \* Pwin > (1-Pwin) \* Dharm

Also, factor in any public interest considerations

Minimizes error

Losses difficult to accurately ascertain

Losses of certain Constitutional rights

* + - * 1. Duration:

PI: Normally lasts until disposition of suit

TRO: Max at 14 days, and court may make it even shorter

Why?

In addition to drastic consequences, short duration gives greater assurance that extensions of restraining order will get careful judicial consideration.

Since a TRO is before adjudication on an incomplete or sketchy record, want to minimize duration.

Just needs to last until PI can be decided

Due process concerns

* + - * 1. Security (c)

Usually in the form of a bond

Can fit at discretionally nominal amount for poor P

Ordinarily sets ceiling on what D can recover from wrongful injunction.

* + - * 1. Decisions on PI are not determinations of merits (Country Floors).
  1. Appellate Review
     1. Reasons For
        1. Correctness Review
        2. Institutional Review: Harmony and consistency in development and use of legal rules across judges within same jurisdiction
        3. Extra check on judiciary
     2. Final Decision Rule – 28 U.S.C. § 1291
        1. Rule:
           1. One which ends the litigation on the merits and leaves NOTHING for the court to do but execute the judgment.
           2. Thus, can’t normally get immediate review of discovery, joinder of claims, etc. (interlocutory decisions) until after final decision.
        2. Pros/Cons:
           1. Harmless errors might become moot!
           2. Efficiency for court of appeals
           3. Maintain integrity of DC decisions
        3. Exceptions:
           1. 28 U.S.C. 1292(a) – Injunctions

*Does not include TROs (because of short duration)*

* + - * 1. 28 U.S.C. 1292(b)

Great importance warranting immediate review

BUT DC judge must give this right.

Appellate court can refuse for whatever reason.

LIMITED IMPACT

* + - * 1. 28 U.S.C. 1292(e)

U.S. Supreme Court allowed to set rules for when appellate review can be had for certain interlocutory decisions.

Only time done for FRCP is 23(f)

* + - * 1. Rule 54(b)

In multiple claims, the court may direct entry of final judgment from one or more of the claims or parties *only if court determines that there is no just reason for delay*.

* + - * 1. Mandamus – 28 U.S.C. § 1651

Brought in court of appeals by party dissatisfied with ruling

Brought directly against DC judge

If issued, orders DC judge to do or not do some act.

Theory:

By issuing order, DC has exceeded jurisdiction.

OR by refusing, failed to fulfill judicial obligation.

Standard: Supposed to be only available when “manifestly extremely important” to issues of case and of extreme general importance as a matter of procedural law.

* + - * 1. Contempt

*Nonparty* in contempt is entitled to appeal from contempt.

Why? A *nonparty* can’t appeal from final decision. So, contempt judgment is “final” for nonparties.

* + 1. Procedure: FRAP
       1. Standards of Review
       2. If appellate court thinks further testimony is needed, will remand to DC.
    2. Stay of proceedings to enforce judgment – Rule 62
       1. Ordinary judgment
          1. Automatic stay of enforcement for 14 days after entry (62(a))
          2. If party makes post-judgment motion, court has *discretion* and may stay until disposition of motion (62(b)).
       2. On appeal – 62(d) and (e)
          1. Right to say upon giving supersedeas bond that meets DC approval
          2. Usually amount sufficient to cover judgment, costs on appeal, interest, and damages for delay consequent to the stay.
          3. WHY (Long v. Robinson)?

Likelihood of prevailing on merits of appeal

Likelihood of suffering irreparable injury if denied

Harm to other parties if stay is enforced

Public interest served by enforcement of stay

* + - 1. Injunctions
         1. No provision for automatic stay
         2. DC discretion either prior to or after appeal
      2. If court of appeals denies stay, may seek immediate relief from a single justice of the SC, and, if denied, ask another justice (28 U.S.C. § 1651(a)).
  1. Supreme Court Review – 28 U.S.C § 1254
     1. Nearly all appeals to S.C. are discretionary.
     2. *Institutional* concerns, not really correctness
     3. Mechanics: 28 U.S.C. § 2101
        1. (a) – If saying that an act of Congress in unconstitutional
           1. Within 30 days after entry of interlocutory or final order, judgment, or decree
           2. Docketed within 60 days from time appeal is taken
        2. (c) – Other Certiorari
           1. Within 90 days after entry of judgment or decree
           2. May extend time for good cause, but not more than 60 days extra
        3. (e) – Certiorari before judgment rendered by court of appeals (any time before judgment)
        4. (f) – From final review, you can stay for reasonable time to obtain certiorari.