

FEDERAL JURISDICTION & PROCEDURE

10 February 1998

I. SUBJECT MATTER JURISDICTION

A. Basic Idea

- Federal Courts can ONLY hear certain types of suits.
- Mostly *Diversity of Citizenship & Federal Question Cases*

B. Diversity of Citizenship Cases

- Amount in Controversy MUST **exceed \$75,000** and the action must be between Citizens of Different States

1. Complete Diversity Rule: Federal Courts Lack Subject Matter Jurisdiction if *Any* Plaintiff is a **Citizen of the *Same State* as *Any* Defendant**

- To Analyze, Cross the T, Lack Diversity
- **Individuals**: Citizenship = **Domicile** which is a Factor of:
 - *Presence in the State* +
 - *Intent to Make it Home for the foreseeable future* (or permanent home)
 - May have **ONLY 1 Domicile, ergo Citizen**, at a Time
 - Test for Domicile/Citizenship is at **TIME CASE FILED**
 - If Change Domicile after transaction but before file, can be sufficient for Diversity. Test is **TIME FILED**. Domicile has a Subjective Intent
- **Corporations**: Citizenship = State Where **Incorporated** + **PPB**
 - Thus, Corp. may be citizens of 2 States at same time
 - Corp. only has **1 PPB**. Either *Headquarters* or *Major Production Ctr.*
- **Un-incorporated Associations (including Partnerships)**
 - The Citizenship of an unincorporated association = **CITIZENSHIP** of Each of its members, ergo, up to 50 state citizenship (thus, tough to get them in Court on a Diversity Claim)
- **Descendants, Minors, & Incompetents**
 - Their Citizenship is Their Own, NOT Their Representative

2. Amount in Controversy

- **GOOD FAITH ALLEGATION** that the Claim *exceeds \$75,000*, exclusive of Interests & Costs. However, if Plaintiff ultimately recovers less than \$75,000, jurisdiction is *Unaffected*, though the Plaintiff **MAY** be liable to the Defendant for Costs
- The Amount In Controversy **MAY NOT** Include prospective punitive damages (amount in controversy is for Compensatory Damages **ONLY**)
- There is **Aggregation**: can aggregate 2 Claims which individually are less than \$75,000 but when aggregated are sufficient. However, for Aggregation, the Claims **MUST BE AGAINST THE SAME DEFENDANT** (2 Claims v. 1 Defendant is fine).
- For **joint claims**, use the total value of the land in controversy.
- For **Injunctions**, there is a Split In Authority
 - Majority (Plaintiff): Does Defendant's Action potentially Harm Plaintiff by \$75,000 or more?
 - Minority (Defendant); Does it Cost the Defendant more than \$75,000 to comply with an Injunction?

3. Collusion

- By STATUTE, Federal Court is DEPRIVED of SMJ when a Party has been Improperly or Collusively Made or Joined to Invoke Diversity Jurisdiction
- Watch for an ASSIGNMENT of a claim to Create Diversity. There is No SMJ if the Assignee is a mere Collection Agent for the Assignor

4. Exclusion

- Even if Tests for Diversity of Citizenship & Amount in Controversy are Met, Federal Courts WILL NOT Hear Cases involving *issuance of divorce, alimony, child custody, or Probate of an Estate*

C. Federal Question Cases

- Complaint must show a RIGHT or INTEREST Founded Substantially on a Federal Law (including Constitution & Federal Legislation)
- *Citizenship* is Irrelevant & there is No Amount in Controversy Requirement
- Well Pledged Complaint Rule: Plaintiff's Claim, *Properly Pledged*, MUST be Based on a Federal Law. Properly Pledged = the complaint sets Forth ONLY a Claim, without anything extraneous which has nothing to do with the claim itself. Always Ask: Is Plaintiff Enforcing A Federal Right?
- Note: Remember the Man given a Lifetime Pass on a Train. Then a Federal Law is passed outlawing such passes. The Man brings suit in Federal Court against the Rail Road, alleging breach of contract. The Defendant Rail claims a defense of impossibility due to the new Federal Statute. Although a Federal Statute is involved, this is NOT a federal question case. It is a Contract Case. It is NOT sufficient to say, well the defendant will raise the Federal Statute in their defense. The Federal Question MUST BE ON THE FACE OF THE COMPLAINT.
- Note: For Every CLAIM **joined** in federal court, must insure that there is a basis for SMJ. Each Claim can only get into court through its own independent basis of Diversity or Federal Question, or Supplemental Jurisdiction.

D. Supplemental Jurisdiction

- Allows a Federal Court to Entertain Claims over which it would have NO **independent basis** for SMJ. Pre-requisite: 2 Claims, at least 1 Fed. SMJ

1. Pendent Jurisdiction

- CLAIMS **Joined** by the **Plaintiff** in a **Federal Question Case** (PFQ)
- The Federal Question must be *substantial*
- The Claims must Share a *cnof: common nucleus of operative fact* (same transaction or occurrence)
- Court has *Discretion NOT to hear*. Occurs if the Federal Claim has been **dismissed** before trial OR if the State law Claim is **complex** OR if the State Law Claims would **predominate**

2. Ancillary Jurisdiction

- CLAIMS **Joined** by **Any Non-Plaintiff** in **Any Case** (Diversity or Federal Question)
- CLAIM arises from *cnof: common nucleus of operative fact* (same transaction or occurrence)
- Court has *Discretion NOT to hear*, as with Pendent
- Often Arises in JOINDER Situations since propriety of joinder is often keyed by whether joined claim was the same transaction or occurrence

E. Removal

- Allows **Defendants** (ONLY) to have a Case which was FILED in STATE COURT **removed** to the Federal Court Encompassing the State Court in which the original Claim was filed
- General Test: Could the Claim have been HEARD in Federal Court (i.e., does the Federal Court have SMJ over the Claim? May be EITHER Diversity or Federal Question). If So, then it Is Removable.
- ONLY Remove from State Court to Federal Court (Can't Remove from Federal Court to State Court)
- ALL Defendants MUST Agree to the Removal in order to have a Valid Removal, unless there is a **separate & independent federal claim** involved against ONLY 1 Defendant, then that Defendant may REMOVE the Entire Case, but the Court MAY Remand State Law Issues
- Plaintiff who Counter-Claims May not Remove (This is for DEFENDANTS only)
- Exception: There is NO Removal (in Diversity Cases ONLY) if ANY DEFENDANT is a Citizen of the FORUM. However, in Federal Question Cases, Citizenship of a Defendant in the Forum is immaterial. Also, in Diversity Cases, REMOVAL MUST OCCUR WITHIN **1 Year** after the Case was filed.
- Procedure:
 - *Defendant files Notice of Removal in Federal Court, stating grounds*
 - *Signed under Rule 11*
 - *Attach ALL documents Served on Defendant in the State Action*
 - *Send a Copy to All Adverse Parties*
 - *MUST REMOVE WITHIN 30 Days of the Case Becoming Removable (note 1 year period for Diversity, i.e., if 1 Defendant of Forum Drops out)*
 - *At that point, case is AUTOMATICALLY REMOVED to federal court*
 - *If improper, Plaintiff must MOVE to REMAND to State Court within 30 Days if Based on a non-SMJ defect;*
 - *Case Will be Remanded whenever there is no SMJ*
 - *Filing a PERMISSIVE Counter-claim in State court waives Right to Remove*

F. The Erie Doctrine

Basic Idea

- Erie Concerns the CHOICE of Law, between Federal & State.—When does a Federal Court Apply Federal Rules & when to apply State Rules
- Usually in Diversity Cases

Black Letter Rule

- Federal Courts Apply *State Substantive Law* and *Federal Procedural Law* to these types of claims.
- If the State Substantive law is unclear, may certify the issue to the State Supreme Court for Clarification

Process to Test for Substance or Procedure

1st: Is there a FRCP or FRE ON POINT which Directly CONFLICTS with the State law? If so, the Rule is *presumptively procedural* and the Federal rule is to be applied so long as it is Constitutional (which it always is)

2nd: If no FRCP or FRE on POINT, Apply the **Erie Test**; Guides –

outcome determinative: If Applying the State or Federal Rule would Affect the outcome of the case, then it is PROBABLY **Substantive**

Balance of Interests: Does either the Federal or State system have a strong interest in Having its Rule Applied?

Avoid Forum Shopping: idea is to have the federal court act like a state court in diversity cases; don't want people flocking to federal court because they feel they can get a different substantive law applied.

Statutes of Limitations & Tolling Rules are **SUBSTANTIVE**, Therefore, a Federal Court in a DIVERSITY Case must Apply the State Rules on Statutes of Limitation & Tolling Rules.

II. VENUE

A. Basic Idea

- Which Federal District? Removed Cases go to the District encompassing the state court where the action was originally filed. These rules are for PLAINTIFFS who initiate the Claim in Federal Court

B. The Rules

- In ANY Case (Diversity or Federal Question), Plaintiff MAY lay VENUE in **ANY District** Where:
 - **ALL** Defendant's **Reside** (or if All Defendant's are in the same state but different districts, then where any District where any defendant resides) OR
 - A **SUBSTANTIAL PART** of the Claim Arose
- If there is NO district anywhere in the US that satisfies either above test (rare, only for claims overseas), then Venue can be Laid:
 - **FEDERAL QUESTION**: Any District where Defendant is **found**
 - **DIVERSITY**: Any District where Defendant is **Subject to PJ**

C. Determining Residence

Individuals: Residence Basically Equals **DOMICILE**

Corporations: ≠ Domicile. A Corporation **RESIDES** in **ALL DISTRICTS** where the Corporation is Subject to Personal Jurisdiction (pretty much anywhere)

D. Local Actions

- Actions regarding OWNERSHIP, POSSESSION or INJURY to **LAND** Must be Filed in the DISTRICT where the Land Lies

E. Transfer of Venue

- From 1 Federal District Court to Another Where the Case COULD HAVE BEEN Brought originally (one that has proper venue & personal jurisdiction over the Defendant)
- If Venue in the ORIGINAL VENUE was PROPER, may transfer to another federal district court if, in court's discretion,
 - It is a Convenience to the Parties
 - It is a Convenience to the Witnesses
 - It is in the Interests of Justice
 - The Court to which the Case is Transferred MUST apply the choice of law rules that the original court would have used (even if the plaintiff initiated the transfer)
- If Venue in the ORIGINAL VENUE was IMPROPER, the court may transfer *in the interests of justice* OR the court may *Dismiss*

III. SERVICE OF PROCESS

- In Addition to Personal Jurisdiction, Must give *Notice* to the Defendant. The **FRCP** prescribe Acceptable Means of Serving Process. May Also use means **Allowed by State** where the Federal Case is Pending or where the Service is Effected
- **Process** (Summons + Copy of Complaint) may be SERVED (delivered) by *Any non-party who is At Least 18 Years Old*
- **Personal Service** may be Effected wherever the Defendant is found
- **Substitute Service** is permissible so long as it is Left :
 1. *At Defendant's USUAL Abode*
 2. *Served Upon a Person of SUITABLE Age & Discretion RESIDING therein (i.e., not the baby-sitter)*
- **Waiver of Service**: Process MAILED to Defendant is OK if the Defendant RETURNS the Waiver Form **within 30 days**. By so doing, the Defendant WAIVES formal Service of Process & nothing else (like Personal Jurisdiction). If the Defendant DOES NOT return the Waiver, he must be served **personally** or **by substitute service** and the Defendant MUST PAY for that SERVICE
- **Process Delivered to Defendant in Another State**: Permissible if State Law so allows. Exceptions where a Federal Court Can SERVE OUTSIDE the Forum regardless of the State Law: (1) BULGE RULE & (2) STATUTORY INTERPLEADER
- **Agent Service**: Process may be delivered to Defendant's Agent if Service is WITHIN the SCOPE of the AGENCY
- **No In-state Service if Defendant is In-state as a Witness or Party in Another Case – Defendant is IMMUNE from Service of Process**

IV. PLEADINGS

A. Basic Idea

- FRCP uses **Notice Pleading**: pleadings are only required to CONVEY to the OTHER Parties ENOUGH of the contentions so as to allow a MEANINGFUL Response

B. Rule 11

- Requires the ATTORNEY to **SIGN** all pleadings, written motions, and Papers (except discovery documents) CERTIFYING that to the best of the Attorney's Knowledge & Belief, **after reasonable inquiry**, the Document is **Not for an Improper PURPOSE, Supported by LAW (or non-frivolous argument for Change), FACTUAL Contentions & Denials of Factual Contentions have Evidentiary Support, or are likely to after further investigation**
- CERTIFICATION is Effective EVERY Time the Position is PRESENTED to the Court (filing & oral arguments)
- MOTION for **Violation** is SERVED, but NOT FILED with the Court. Party Alleged to be in Violation of Rule 11 has **21 DAYS** to Withdraw the Document. IF does not withdraw the Document, the Motion can be Filed or the Court may raise on own.
- SANCTIONS may be LEVIED Against the **Attorney, Firm, or Party** (Discourage, not Punish Wrong-doing)

C. Complaint The Principal Pleading of the PLAINTIFF

1. *Statement of SMJ*

2. *Short & Plain Statement of the Claim, showing entitled to Relief*

3. *Demand for Judgment*

- That is All that Is Required for a Basic Complaint with NOTICE Pleading
- HOWEVER, Certain Claims must be PLEADED with PARTICULARITY or SPECIFICITY: *Fraud, Mistake, & Special Damages*

D. Defendant's Response

- **RULE 12** Requires the DEFENDANT to RESPOND in 1 of 2 Ways (Answer or Motion) **Within 20 Days** after Service of Process
- **Rule 12 Motions**
 - *Issues of Form*: Motion for a MORE DEFINITE STATEMENT (if Pleading is so Vague that the Defendant can't frame a Response – rarely granted, or a Motion to STRIKE (parses out immaterial allegations & cheap shots)
 - *Matters of Abatement*: Lack of SMJ, Lack of **PJ**, Improper **VENUE**, Insufficiency of **PROCESS**, Insufficient **SERVICE** of Process, Failure to Join an INDESPENSIBLE Party [note: PJ, Venue, Process & Service are WAIVABLE, if not Raised in **1st** Response, either motion or Answer, they will be Waived: SMJ & Failure to Join Indispensable Party need not be raised in 1st response]
 - *Matters re. Merits*: Failure to STATE A CLAIM Upon Which Relief May be Granted, Judgment on the PLEADINGS, SUMMARY JUDGMENT
 - *Timing of Motion*: Motions for More Definite Statement or Motion to Strike **MUST** be filed before a Responsive Pleading else waived. Other Motions, can be brought either before or in the Answer. Note, Certain defenses are waived unless included in 1st Responsive Pleading. SMJ can be raised at Any time. Up through trial, May raise Failure to Join an Indispensable Party and Failure to State a Claim upon which Relief may be granted

- **Answer**
 - Defendant may decide NOT to file a pre-answer motion or else it may be denied. In either scenario, must File an Answer
 - **Timing**
 - If NO MOTIONS: within 20 Days after being served (if waived service, 60 days after Plaintiff mails waiver form)
 - If MOTIONS DENIED: within 10 Days after motion being denied
 - **Responses to Allegations in Complaint**
 - Either **Admit, Deny, Lack Sufficient Information to Admit or Deny**
 - If Lack Sufficient Information, it has the EFFECT of a Denial, but is NOT available if the issue is a Matter of Public Knowledge or in the Defendant's CONTROL
 - Failure to Deny = Admission
 - **Affirmative Defenses**
 - MUST Be PLEADED (or else they are WAIVED) and Any Evidence Relating thereto is Inadmissible
 - Some Aff. Def. Include Res Judicata, Statute of Frauds, Statute of Limitations, Accord & Satisfaction

E. Counterclaims

- OFFENSIVE Claims Against an OPPOSING Party, e.g. Defendant v. Plaintiff. These are FILED with the RESPONSIVE PLEADING (i.e., the Answer)
- **Compulsory Counter-claims**
 - Arises from the SAME Transaction or Occurrence as the Plaintiff's Claim
 - MUST be filed in the Pending Case or else it is WAIVED
 - May NOT be Asserted in a Separate Action: ***use it or lose it***
- **Permissive Counter-claims**
 - Does NOT Arise from the Same Transaction or Occurrence as P's Claim
 - Need NOT be asserted in the pending case, though it is permissive to do so
- **Supplemental Jurisdiction**
 - There is **Ancillary** Jurisdiction for **Compulsory Counter-claims** (same transaction or occurrence standard, Any Party - Plaintiff for Any Claim Diversity or Federal Question)
 - REMEMBER: Always Show the Need for Supplemental Jurisdiction before discussing it (i.e., treat each claim on own: Say this particular claim is NOT within the Federal Court's Subject Matter Jurisdiction because it is neither Diversity nor Federal Question. However, the Federal Court has Ancillary Jurisdiction because the Claim is Raised by a non-Plaintiff party and arises from a Common Nucleus of Operative Fact, etc.)
 - NO Supplemental Jurisdiction Available for PERMISSIVE counter-claims because permissive counterclaims arise out of DIFFERENT Transactions or occurrences

F. Cross-Claims

- OFFENSIVE Claims against CO-PARTIES. May be Asserted if they arise from the Same Transaction or Occurrence as the Underlying Action. These are NOT Compulsory.
- **Supplemental Jurisdiction**: Ancillary Jurisdiction available for Cross-claims

G. Amending Pleadings

- As of Right
 - Plaintiff has a RIGHT to Amend his Complaint **Once** before Defendant Serves his Answer
 - Defendant has a RIGHT to Amend his Answer **Once** within **20 days** of serving his Answer
- With Leave of Court
 - Amendments will be granted if Justice SO REQUIRES (usually permitted as long as No Undue Delay or Prejudice)
- To Conform With the Evidence Presented at Trial
 - If Fail to OBJECT at Trial to the Introduction of Evidence about something NOT raised in the Pleadings, that is an IMPLIED WAIVER. After the Trial, The Complaint may be Amended to Conform to the Evidence. If OBJECT, then the evidence is at variance with the Pleadings & is inadmissible.
- Relation Back
 - Post Statute of Limitation & want to Add a New Claim Against the Same Party. Will not be barred by the Statute of Limitations. SAME PARTIES, NEW CLAIM. May Amend the Pleadings to Relate Back if the New Claims Concerns the SAME CONDUCT, TRANSACTION, or OCCURRENCE as the Original Pleading. Relation Back means you treat the Amended Pleading as though it was filed when the original pleading was filed.

V. JOINDER OF PARTIES & CLAIMS

A. Basic Idea

- FRCP is LIBERAL in Allowing JOINDER on the Theory that it is MORE Efficient to Determine ALL Related Claims and Join ALL Interested Parties in a SINGLE SUIT. If the Case Gets TOO COMPLEX, the court can order Separate Trials for Convenience or to Avoid Prejudice

B. Parties

- Proper Parties: Who May be Joined (*permissive joinder*)
 - Any Party who was Part of the Same Transaction or Occurrence which RAISE at LEAST **1 Common** Question of LAW or FACT
- Necessary & Indispensable Parties (*mandatory joinder*)
 - Some ABSENTEES ought to be Joined because they have some relationship with the Action. Their JOINDER will be **Compelled, if feasible**
 - *Who is Necessary?*
 - Without Absentee, CANNOT ACCORD **Complete** Relief
 - ABSENTEE INTEREST will be **Harmed** if NOT Joined
 - ABSENTEE Claims an INTEREST which subjects a Party (usually Defendant) to **MULTIPLE OBLIGATIONS**
 - JOINT Tortfeasors are NOT NECESSARY
 - If Joinder of Necessary Party is NOT FEASIBLE (i.e., the Court has no PJ over the Absentee or Absentee's Presence would DESTROY Diversity) then the court must EITHER
 - *Proceed without the Absentee OR*
 - *Dismiss the Whole Case*
 - FACTORS the Court Looks at Before Dismissing:
 - *Whether there is an Alternate Forum Available where everyone can be Joined (like a State Court)*
 - *Actual Likelihood of Prejudice*
 - *Any Relief to Avoid Prejudice*
 - If the Court Decides to DISMISS, then the Absentee was **indispensable**
- Impleader
 - A *Third-party Defendant* is Brought in (usually by the Defendant) for INDEMNITY or CONTRIBUTION
 - This Works for JOINT Tortfeasors (unlike Necessary & Indispensable Parties)
 - **HOW**; File a **3rd Party Complaint** Naming the Third Party as Defendant and **Serve Process** on the Third Party Defendant
 - There is a **Right to Implead within 10 Days of Serving One's ANSWER**, After 10 Days, REQUIRE LEAVE of COURT
 - After a Third Party Defendant is JOINED, the Plaintiff in the original suit MAY file a Claim against the Third Party Defendant (no name for that suit) as long as the claim ARISES FROM the SAME TRANSACTION or OCCURRENCE as the Underlying case

- Note: Supplemental Jurisdiction is Available for these Claims
 - **Impleader**: Ancillary Jurisdiction
 - **3rd Party v Plaintiff**: Ancillary Jurisdiction
 - **Plaintiff v 3rd Party**: NO Ancillary, but PENDANT if FEDERAL QUESTION in the underlying case & CNOF
- **Bulge Rule**: Absentees Joined as NECESSARY Parties or by IMPLERDER may be SERVED, Regardless of State Law, *within 100 miles of the courthouse*, even if outside the forum. (Not Available to serve process on the Original Defendants though)
- Intervention
 - Absentee WANTS to Join a Pending Suit. The Absentee CHOOSES whether to come in as a Plaintiff or Defendant. The court MAY Re-align the absentee if it determines that the Absentee entered on the wrong side. Intervention must be TIMELY in 1 of 2 Ways.
 - **Intervention of right**: When the ABSENTEE Interest will be harmed if NOT joined AND the Absentee's Interest is NOT Adequately represented by the Parties
 - **Permissive Intervention**: Allowed Absentee Joinder if the Claim/Defense of Absentee shares with the Pending Case AT LEAST ONE Common Question of Law or Fact. Watch for Delay & Prejudice. Beware of SMJ & Jurisdictional Issues
 - There is NEVER Supplemental – Ancillary Jurisdiction Allowed for PERMISSIVE Intervention. NO Supplemental – Ancillary Jurisdiction for Intervention as of Right when the Absentee wants to JOIN as a PLAINTIFF. However, there is Supplemental – Ancillary Jurisdiction for Intervention as of Right when the Absentee wants to JOIN as a DEFENDANT
- Interpleader
 - An Entity holding MONEY or OTHER PROPERTY wants to Force ALL *potential Claimants* into a Single lawsuit. Idea is to avoid Multiple Litigation and the Threat of Inconsistent Results.
 - **Stakeholder**: person holding the property
 - **Claimants**: the people who want the property
 - Two Types of Interpleader: **Rule** (FRCP 22) & **Statutory**. In both, the Stakeholder is uncertain as to who owns the property and wants to avoid multiple suits. There are Differing rules for Jurisdiction & Service of Process. In each, the Court can ENJOIN claimants from suing elsewhere:

	<u>Rule Interpleader</u>	<u>Statutory Interpleader</u>
<i>Diversity of Citizenship</i>	STAKEHOLDER must be Diverse from EVERY CLAIMANT	ONE CLAIMANT must be Diverse from ONE OTHER CLAIMANT
<i>Amount in Controversy</i>	Must EXCEED \$75,000	\$500 or More
<i>Service of Process</i>	Same as Regular Lawsuit	NATIONWIDE Service of Process (PJ is NEVER an issue)

- On Exam, Discuss Both Types and Tell which applies & Why

C. Claims

- A PARTY asserting ANY Claim by Complaint, Counter-claim, Cross-claim, or Third-Party Claim (interpleader) may JOIN AS MANY CLAIMS as the Party has against an **opposing party** WITHOUT regard to Transactional Relatedness (so long as EACH CLAIM has a basis in SMJ)

D. The Class Action

- a Representative sues on Behalf of a Group
- Initial Requirements
 - **Numerosity** (too numerous for practical joinder: no magic #)
 - **Commonness** (Fact or Law questions common to class)
 - **Typicality** (claim of Rep. Is typical of claims of group)
 - **Adequate Representation** (representative & attorney Adequately represents the interests of the class)
- Next Step: After meeting initial requirements, must fit 1 of 3 types
 1. *Prejudice*: Class Treatment NECESSARY to Avoid HARM to either Class Members or Party Opposing the Class. (i.e., claimants to a fund, wherein Individual suits might deplete the fund leaving some without a remedy)
 2. *Injunction or Declaratory Judgment*: Due to Class being Treated Alike by the Opposing Party (no damages here)
 3. *Damages*: Common Questions PREDOMINATE and the Class Action is the Superior Method for Resolving the Dispute (like a Mass tort)
- Notification of Members in a Class:
 - In Class 3 DAMAGES, the Class Representative PAYS for INDIVIDUAL NOTICE to ALL *reasonably identifiable members* informing them that they can OPT OUT, BE BOUND if fail to Opt Out, and ENTER a SPECIAL APPEARANCE through Counsel (note: NO Notice Requirements for either Type 1 or Type 2)
- Judgment Binding on Whom
 - All Class Members Except those who OPT-OUT (remember, there is NO opt-out provision for either type 1 or type 2 Class Action)
- There can be NO SETTLEMENT or DISMISSAL of a Class Action WITHOUT **Court Approval**
- SMJ: Watch for problems where the Class tries to INVOKE DIVERSITY. For Diversity of Citizenship Purposes, Look ONLY to the Citizenship of the **Representative**. Amount of Controversy has a Split in Authority. *Majority* states that EACH Member must have Damages in Excess of \$75,000. *Trend* is that ONLY the **representative** must have Damages in excess of \$75,000.

VI. DISCOVERY

A. Required Disclosures

- Initial Disclosures:
 - Must be Produced though no one asks for it. Unless local rule, court order, or stipulation of the parties involved provide otherwise, **within 10 days of a 26(f) Meeting**, MUST Identify **Persons** with Information & Documents relevant to the facts alleged with Particularity in the Pleadings, Computation of Damages, and Insurance for all or part of the judgment
- Experts
 - Must Identify Experts who *may* be used at Trial and **produce a written report** containing opinions, data used, qualifications, compensation for study, etc.
- Pre-trial
 - NO LATER than **30** days BEFORE Trial, must Give **detailed** information about Trial Evidence, including Documents & Identity of Witnesses to Testify LIVE or by Deposition.

B. Discovery Tools & Rules

- Depositions
 - Questions may be Oral or Written. Sworn Statements by Deponent Responding to Questions by Counsel
 - May Depose EITHER **parties or non-parties**
 - Non-party should be subpoenaed; notice of the deposition, properly served is sufficient to Compel Attendance
 - May not Take MORE Than **10** Depositions, no Depose the Same Person **twice** without Court Approval
 - Depositions may be **used at trial** to **Impeach the Deponent**, ANY PURPOSE (if deponent is an ADVERSE PARTY), or ANY PURPOSE (adverse or not) if DEPONENT is **unavailable** at trial, unless the ABSENCE was procured by the party seeking to introduce the evidence.
- Interrogatories
 - Questions propounded in **Writing** to **OTHER PARTY** (can't use on non-parties)
 - Must RESPOND with Answers or Objections **within 30 Days**
 - **ONLY 25** Questions, including Sub-parts allowed, absent court approval
- Requests to Produce
 - Requests for Another **Party** (or **non-party if subpoenaed**) requesting to make available for review and copying various Documents & Things OR permit entry upon designated property for inspection. Must Respond within **30** days of Service, stating that the material will be produced or stating an Objection

- Physical or Mental Examination
 - Only Available through ***Court Order*** upon Showing that the **PARTY's** (or person in party's control) **HEALTH** is in **actual controversy** and **good cause** which means the examination is needed for the case and the information can't be gotten any other way
 - Person examined may obtain a **COPY** of the Report, but by doing so, waives the doctor-patient privilege regarding reports by his doctors regarding the same condition
- Requests for Admission
 - A Request by a **PARTY** to Another **Party** to **ADMIT** the truth of Any Discoverable Matters. Often used to *Authenticate Documents*. Must respond **within 30 days of service**. Response is to Admit or Deny. Failure to deny is deemed admission. May amend so long as failure was not in bad faith.
- Certification of Counsel as to Discovery Requests & Responses
 - Counsel Warrants that request & response is neither for an improper purpose nor unduly burdensome
 - This is **NOT** Rule 11
- Duty to Supplement
 - If party learns that its response to a required disclosure or other discovery matters was incomplete or incorrect, it **MUST** Supplement its response

C. Substantive Scope of Discovery

- Standard: Can Discover ANYTHING **Relevant**, which means *reasonably calculated to lead to admissible evidence* (broader than mere admissibility, may discover inadmissible evidence)
- **Privileged Material is NOT discoverable**
- Expert Witnesses: IF expert won't testify at trial, there can be no discovery absent exceptional need
- Work product: Materials generated by attorney or agents **in anticipation of litigation**: include: statement written by a witness re: incident in question, notes & opinions & legal theories about things a witness said. Non-Mental Impressions (like a witness handwritten statement) **MAY** be Discoverable **ONLY** upon a Showing of **substantial need**. Any Mental-impression Work Product is **NEVER** Discoverable

D. Enforcement of Discovery Rules

- Presented to Court
 - Receiving Party Seeks a **protective order 26(c)**: Over-burdensome request for Discovery
 - Receiving Party Answers Some and Objects to Others: *Partial Failure*
 - Receiving Party *Fails Completely* to participate in Discovery
- Enforcement Tools Against a Violating Party
 - If **partial failure**, COURT ORDER Compelling party to Completely Answer + Costs of Bringing Motion (including Attorney Fees)
 - If **Violate Order**, **RAMBO + Cost** + possible Contempt (but no Contempt for refusing to submit to a medical exam)
 - If **Fail Completely**, **RAMBO + Cost**
 - If Falsely Deny a Request to Admit: Recover Costs of Having to Prove the issue
 - Failure to Make a **required disclosure**: Other side may either choose to treat as a Partial Failure or Complete Failure.
 - **RAMBO**
 - Establishment order (establishes facts as true)
 - Strike Pleadings of the Disobedient Party
 - Disallow Evidence from the Disobedient Party
 - Dismiss the Plaintiff's Case (if bad faith)
 - Enter Default Judgment Against the Defendant (if bad faith)
- Enforcement Tools Against a non-party
 - CONTEMPT for Violating Subpoena or court order
- Enforcement Tools Against Attorney
 - Liability for All Expenses (including Attorney's fees) Incurred by the other side if Attorney Counseled one of the Bad Acts

VII. TERMINATION OF CASE WITHOUT TRIAL

A. Voluntary Dismissal

- FILE Written Notice of Dismissal
- May VOLUNTARILY Dismiss **once without prejudice** (the 2nd time, the voluntary dismissal is dismissed **with prejudice**, even if 1st case was in State court and this case is in Federal Court)
- Dismissal is INEFFECTIVE **unless court orders otherwise** or all parties agree in writing

B. Default & Default Judgment

- *Entry of Default* is **ministerial**, shown as an ENTRY on the Docket. REQUIRE a *Default Judgment* before COLLECT money
- For **Sum Certain**: The **Clerk** may enter the Entry of Default AND Enter the DEFAULT JUDGMENT if
 - There was NO Response at All
 - Claim for Sum Certain
 - Plaintiff has an Affidavit as to what sum certain damages are
 - Defendant is Neither an incompetent nor a minor
- For **Unspecified Damages**, the **Clerk** may enter the ENTRY of DEFAULT, but a **Judge** must Enter the DEFAULT JUDGMENT. However, if a Defendant made an **appearance**, he is entitled to NOTICE & HEARING for **quantifying the Damages ONLY**
- Relief from Default Judgment
 - Between DEFAULT & JUDGMENT: Defendant may make **motion to set aside default** showing *good cause & viable defense*. Good Cause = Excusable Neglect.
 - After JUDGMENT; **motion to set aside judgment** (see Judgment section)

C. Summary Judgment

- Standard: Moving Party Must show that There is **no dispute as to material issue of fact** and that the moving party is **entitled to judgment as a matter of law**. Any party may move. Motion may even be partial
- ≠ Motion to Dismiss for Failure to State A Claim, which is a Judgment on the PLEADINGS
- Summary Judgment looks at EVIDENCE before Trial
- In considering Motion for SJ, There must be Evidence presented by the Plaintiff otherwise it is Dismissed. A Plaintiff may NOT Rely on the Allegations in the pleadings, he must produce some evidence. There must be SUFFICIENT EVIDENCE so as to Create a dispute of Material fact.

VIII. CONFERENCES & MEETINGS

A. Rule 26(f) Meeting

- At least **14 days before scheduling conference**, the parties meet to discuss claims, defenses and settlement. Must form a Discovery Plan and Present it to the court in Writing within **10 days**

B. Scheduling Order

- Court Enters an Order scheduling CUT-OFFS for Joinder, Amendment, Motions, etc.

C. Pre-trial Conference

- Court holds a pre-trial conference(s) as needed to Expedite the Case and Foster Settlement. A FINAL pre-trial Conference determines the *issues* to be tried and *evidence* to be admitted. Recorded in the pre-trial conference order is stuff that **supersedes the pleadings**; may be amended ONLY to prevent manifest injustice

IX. TRIAL, JUDGMENT & POST-TRIAL MOTIONS

A. Jury Trial

- Demand: Must demand in WRITING no later than **10 days after service of the last pleading**. (may be done either in pleading or in separate document)
- Right to Jury Trial: **7th** Amendment preserves Right to Jury Trial in Actions AT LAW, but not in Suits at EQUITY. If a Case involves issues of BOTH law & equity, will get a Jury on the Law Issues & judge on the equity issues. Will always try the law/jury issues first.
- Composition of Federal Civil Jury
 - No FEWER than **6**, no MORE than **12**
 - ALL must participate in Verdict unless Excused for Good Cause (there are no Federal Alternate Jurors in Civil Cases)
 - NO verdict may be taken from fewer than 6
 - Verdict must be UNANIMOUS unless parties agree otherwise
 - 3 Peremptory Strikes per side; unlimited Strikes for CAUSE
- Peremptories
 - **3**: but Unconstitutional to Peremptory Strike a potential juror on account of *Race* or *Gender*
- Motion for Judgment as Matter of Law (Directed Verdict)
 - Exceptional Order, effect of which is to take the Case AWAY from the Jury
 - May be brought TWICE by Defendant: At Close of PLAINTIFF's CASE, or At Close of ALL EVIDENCE. Plaintiff can only move once, at the CLOSE of ALL EVIDENCE
 - Standard: *reasonable people could not disagree on the result (there is only 1 possible outcome)*

B. Renewed Motion for Judgment as a Matter of Law (jnov)

- Situation: Jury returns a Verdict for Party A & court enters Judgment on the basis of the Verdict. Other party files a RENEWED Motion for Judgment as a Matter of Law.
- Standard: *reasonable people could not disagree on the result (there is only 1 possible outcome)*
- Motion for Judgment as a Matter of Law at CLOSE OF ALL EVIDENCE is a **pre-requisite** to a Renewed Motion for Judgment as a Matter of Law (jnov).
 - Even if make a Motion for Judgment as a Matter of Law at close of Plaintiff's case, unless make a Motion for Judgment as a Matter of Law at close of ALL Evidence, cannot make a Renewed Motion for Judgment as a Matter of Law after the Verdict.
- Timing: Must Move within **10 Days** After Entry of Judgment

C. Motion for a New Trial

- Situation: Judgment ENTERED, but ERRORS at Trial Require a NEW TRIAL
- Grounds:
 1. *Error at Trial Makes Judgment UNFAIR* (wrong jury instruction, evidentiary ruling, etc.)
 2. *New Evidence*
 3. *Prejudicial Misconduct of PARTY or Juror* (lied on voir dire, etc.)
 4. *Judgment Against the Weight of the Evidence* (Serious error of judgment by jury)
- Timing: must move **within 10 days of entry of judgment**
- Comparison to (jnov) Renewed Motion for Judgment as a Matter of Law: A new trial is less radical since it results in starting over, NOT granting judgment in exact opposition to the jury verdict

D. Motion to Set Aside a Judgment

Grounds

1. Clerical Errors
2. Mistake, Excusable Neglect, Surprise
3. New Evidence (post due diligence search)
4. Judgment Void

Timing

Anytime
Reasonable Time
(within 1 year)
Reasonable Time
(within 1 year)
Reasonable Time
(no limit)

X. APPEAL

A. Final Judgment Rule

- General Rule is that Appeals are allowed ONLY from **Final judgments**, which means an ULTIMATE Decision by the Trial Court on the Merits of the ENTIRE Action. Policy to avoid piecemeal appeals & delay
- To Determine whether Final Judgment: After the Order, does the Trial court have anything left to do on the merits of the case? If so, then it is probably not final.
- NOT FINAL JUDGMENT: Denial of Motion for Summary Judgment, Grant of Motion for a New Trial
- FINAL JUDGMENT: Grant or Denial of Renewed Motion for Judgment as a Matter of Law (jnov)

B. Interlocutory (non-final) Review

- As of Right:
 - Injunctions (orders which grant, modify, or refuse)
 - Appointment of Receivers
 - Patent Infringement
 - Attachments (& other orders affecting possession of property)
- Interlocutory Appeals Act
 - Allow Appeal of interlocutory order only if trial judge certifies that the order involves a controlling issue of law as to which there is substantial ground for difference of opinion AND the court of appeals agrees to hear the appeal
- Collateral-order Exception
 - Court of Appeals has DISCRETION to hear appeal regarding issues collateral to the case if it involves an IMPORTANT legal issue. Need not hear it though. Usually, courts have become increasingly hostile to this.
- Multiple Claims or Parties
 - Trial court may expressly direct entry of a final judgment as to one or more if it also makes an express finding that there is no just reason for delay
- Extraordinary Writ
 - Though not technically an appeal, but an original proceeding in appellate court to COMPEL the trial judge to make or vacate a certain order. Not a substitute for appeal, but available to enforce a clear legal duty

XI. 11TH AMENDMENT

- BARS the Federal Courts from Hearing DAMAGES Claims Against the States
- States, though, may WAIVE 11th Amendment Immunity
- 11th Amendment Does NOT BAR Injunctive or Declaratory Claims
- *For Example:* if sue UMASS for Damages, cannot be done due to the 11th Amendment. Nor may one sue the MA Board of Bar Examiners for Damages.