

Chapter 3

Federal Civil Litigation

A. Introduction

1) This chapter provides an overview of civil litigation in the federal court system in the United States. The chapter starts with some general concepts of jurisprudence in the United States. Although the focus of the chapter is the federal court system, a critical component of successfully using the federal courts is understanding how they dovetail with the separate court system that each State operates. Following this comparison, the chapter will explain some of the Constitutional limitations pertaining to the federal courts' ability to exercise jurisdiction over the disputes presented and the parties named in a lawsuit.

2) The chapter will then proceed along the arc of a typical lawsuit. It will identify and explain the Federal Rules of Civil Procedure governing the initiation of a lawsuit through the filing and serving of a complaint. It will cover lawsuits ranging from one plaintiff suing one defendant through class actions involving parties too numerous to name individually. It will explain the defendants' options in responding to a complaint, either by a responsive pleading called an answer or a preliminary challenge to the sufficiency of the action.

3) After the parties and claims are established, many lawsuits in federal court enter the discovery phase. This chapter will explain the discovery process in the United States, which is profoundly different from discovery in Germany and other European countries.

4) An important step in the litigation process often occurs following discovery—motions for summary judgment. The chapter will explain that the purpose of a trial in the United States is to determine the facts that are in dispute. If no material facts are actually disputed, there is no need for a trial, and instead the judge can decide the outcome as a matter of law and enter summary judgment.

5) More than 98% of the cases filed in the United States are resolved short of trial, primarily either by court ruling on a motion or by settlement. The chapter will discuss the process for settling a case, followed by the procedures for those cases that make it all the way to trial, either before a jury or a judge.

6) The chapter will end with three concepts regarding the finality of the results of the trial. It will explain parties' ability to ask the court to reconsider the outcome and, failing that, parties' ability to appeal the outcome to a higher court. Finally, the chapter will discuss the way in which a final judgment precludes parties from trying to relitigate the claims or issues decided in the trial.

B. General Jurisprudential Concepts

I. Organization of the Federal Courts

7) Article III of the United States Constitution establishes the federal court system. Section 1 provides, in relevant part, “The judicial power of the United States, shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish.” Congress “ordained and established” the inferior courts in its very first session in the Judiciary Act of 1798.¹ It established a three-tiered system, with trial judges operating in “**district**” courts, intermediate appellate courts operating in “**circuits**,” and the **Supreme Court** having the last word.

8) Presently, the U.S. federal court system comprises 94 districts.² These districts are organized according to the state boundary lines. Smaller states such as Delaware have only one district, the “District of Delaware.” Larger states have up to three districts; California has the U.S. District Court for the Northern, Central, and Southern District of California. For convenience and administration purposes, each district may be further divided into divisions.

9) The intermediate appellate courts are divided into 13 U.S. Courts of Appeals, with each court called a “circuit.”³ Twelve of the circuits encompass different regions of the United States. For example, the U.S. Court of Appeals for the First Circuit hears appeals from the district courts located in the states of Maine, Massachusetts, New Hampshire, Rhode Island, and the territory of Puerto Rico. The thirteenth court of appeals is the U.S. Court of Appeals for the District of Columbia Circuit, which handles the important function of hearing appeals of regulations or “rulemaking” by many federal agencies.⁴

10) The vast majority of cases filed in federal court originate in the district courts, where a single judge presides over the action. As discussed in more detail below, a party unsatisfied with the outcome at the district court may take an appeal as of right (without asking for permission) to the appropriate court of appeals, where typically a panel of three judges hears the appeal and rules by majority vote. Parties do not generally have a right, however, to an appeal before the U.S. Supreme Court. Rather, parties only have a right to request that the Supreme Court hear their appeal, and the Supreme Court grants only a small fraction of those requests.⁵ There are nine justices on the Supreme Court, and they primarily sit “en banc,” with all nine attending arguments and deciding by majority vote.

Practice Tip

Judges on the district courts and courts of appeals are referred to as “judge,” but judges on Supreme Court are referred to as “justice.” There is a parallel difference in the capitalization of the word “court.” The highest

¹ 1 Stat. 73.

² See www.uscourts.gov for a description of the organization and location of the various U.S. federal courts.

³ *Id.*

⁴ See Eric M. Fraser, David K. Kessler, Matthew J.B. Lawrence, Stephen A. Calhoun, *The Jurisdiction of the D.C. Circuit*, 23 CORNELL J.L. & PUB. POL'Y 131 (2013).

⁵ See www.supremecourt.gov (the Supreme Court receives 7-8,000 requests each year and hears argument in only about 80).

court in any jurisdiction—the Supreme Court in the US federal court system—is referred to as the “Court,” whereas all lower courts are referred to as the “court.”

11) Proceedings in federal courts are governed by rules residing in a number of different locations. There are a variety of rules of procedure governing proceedings in the various federal courts. The federal trial courts apply the **Federal Rules of Civil Procedure**,⁶ the courts of appeal apply the **Federal Rules of Appellate Procedure**,⁷ and the Supreme Court applies the **Rules of the Supreme Court of the United States**.⁸ In addition, many districts enact **local rules** that supplement, but may not contradict, the federal rules.⁹ Individual judges may even supply additional detail through standing orders or chambers rules.

12) In addition to these rules of procedure, many procedural aspects of federal court practice are located in federal statutes. Title 28 of the United States Code contains many of the statutes governing the courts’ business, such as the provisions governing the courts’ jurisdiction and venue (discussed below). Furthermore, many federal statutes create causes of action, and procedural provisions governing those causes of action are often included in those statutes.

Practice Tip

For example, the Comprehensive Environmental Response, Compensation, and Liability Act (“CERCLA”), an environmental statute sometimes referred to as the “Superfund” law, creates a right for parties who clean up a contaminated property to seek recovery of some or all of their response costs from parties who caused the contamination, such as prior owners.¹⁰ CERCLA vests the federal district courts with exclusive jurisdiction over actions under the statute, sets venue in the district where the contaminated property is located, establishes a statute of limitations for actions under the statute, determines the parties that may properly be included in the action, and controls a host of other procedural aspects of actions under the statute. Thus, a lawyer handling a case under CERCLA must consider the Federal Rules of Civil Procedure, the local rules of the district where the case is pending, any standing orders or chambers rules of the individual judge to whom the case is assigned, the general court provisions in Title 28 of the US Code, and the provisions of CERCLA.

II. Comparison with State Courts

13) The United States has essentially two parallel, and often overlapping, court systems. In addition to the federal court system described above, each state has its own court system. The state court systems each have their own sets of statewide rules of procedure, local rules, and procedural statutes.

⁶ Available at <http://www.uscourts.gov/rules-policies/current-rules-practice-procedure/federal-rules-civil-procedure>.

⁷ Available at <https://www.law.cornell.edu/rules/frap>.

⁸ Available at <http://www.supremecourt.gov/ctrules/2013RulesoftheCourt.pdf>.

⁹ See FED. R.CIV. P. 83, governing local rules. Local rules are typically available on the district court’s website.

¹⁰ 42 U.S.C.A. § 9601, *et seq.*

14) Although the state court systems all have trial courts and appellate courts, the precise configurations are not identical to the federal system or consistent from state to state. For example, some states do not have intermediate courts of appeal, like West Virginia and Nevada. In those states, parties have an automatic right to appeal directly from the trial court to the Supreme Court. Because of the volume of appeals that the Supreme Court in such states must hear, they typically sit in panels of three, rather than *en banc*. Other states have more than three courts, with specialty courts to hear smaller claims, certain categories of actions, or particular types of appeal. For example, Pennsylvania has a Commonwealth Court, which handles both trial and appeals of specific categories of actions, primarily when the state is a party (as in a challenge to a state regulation).

15) For some claims, the federal and state courts have **concurrent jurisdiction**. In that circumstance, the plaintiff may choose to file the action in either a federal or state court. For other claims, one court system or the other has **exclusive jurisdiction**.

III. Subject Matter Jurisdiction

16) “**Subject matter jurisdiction**” refers to the limitations on the type of dispute that a court may hear. While most state courts are courts of **general jurisdiction**—meaning they can hear any type of case except those explicitly excluded (such as small claims that proceed in a small claims court), federal courts are courts of **limited jurisdiction**—meaning they can only hear the categories of case explicitly authorized.

17) The subject matter jurisdiction for federal district courts is established by statute. Although there are a number of grants of federal court subject matter jurisdiction, the two primary categories are **federal question jurisdiction** and **diversity jurisdiction** (discussed immediately below). Without at least one form of subject matter jurisdiction, a federal court may not hear a dispute. This requirement is quite strict and may not be waived or stipulated. Indeed, if an appellate court realizes on appeal following trial that the trial court did not have subject matter jurisdiction, it will vacate the trial court’s judgment and the parties will have to start the process over in state court.¹¹

a. Federal Question Jurisdiction

18) Federal courts are authorized to exercise jurisdiction over claims “arising under the Constitution, laws, or treaties of the United States.”¹² Federal question jurisdiction is intended to promote a uniform application of federal laws across the United States, so that federal laws do not mean one thing in a federal court in New York and something completely different in a federal court in California. Under a doctrine called the “**Well Pledged Complaint**,” the claim arising under federal law must be found in the complaint, not in a defense asserted in the answer.¹³

19) Thus, for example, the civil rights statute creates a cause of action whereby private citizens may sue governmental entities that infringe the citizens’ constitutional rights.¹⁴ A plaintiff may file a civil rights action under those federal statutes in federal court, invoking the court’s federal question jurisdiction.

¹¹ See, e.g., *Hart v. Terminex*, 336 F.3d 541, 544 (7th Cir. 2003).

¹² 28 U.S.C.A. § 1331.

¹³ See, e.g., *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58, 62, 107 S.Ct. 1542 (1987) (citing *Louisville & Nashville R. Co. v. Mottley*, 211 U.S. 149, 29 S.Ct. 42, 53 L.Ed. 126 (1908)).

¹⁴ See, e.g., 42 U.S.C.A. § 1983.

b. Diversity Jurisdiction

20) Federal courts are also authorized to exercise jurisdiction over state law claims among citizens of different states.¹⁵ Diversity jurisdiction is designed to protect parties from a state other than the one where the case is filed from favoritism by the local judge toward parties from the forum state. Diversity jurisdiction is more complex than federal question jurisdiction. There are two primary requirements for diversity jurisdiction: **complete diversity of citizenship** and an **amount in controversy** exceeding \$75,000.

1. Complete Diversity of Citizenship

21) Complete diversity of citizenship means that no plaintiff is a citizen of the same state as any defendant. Thus, if a complaint contains two plaintiffs, one from Massachusetts and one from Vermont, and two defendants, one from Maine and one from Vermont, the court may not exercise diversity jurisdiction. The overlap in citizenship between the Vermont plaintiff and the Vermont defendant prevents the court from exercising diversity jurisdiction over any aspect of the case, even the claim between the Massachusetts plaintiff and the Maine defendant.

22) Citizenship is determined differently for different types of parties. An individual is a citizen of only the state where the individual is a **domicile**, which is the individual's place of permanent residence. A corporation is a citizen of the state in which it is incorporated and the state where its **principal place of business**—typically its headquarters—is located. Unincorporated organizations like partnerships are citizens of each state where their members or partners are citizens.

2. Amount in Controversy

23) For the simplest case—one plaintiff asserting one claim against one defendant—the amount in controversy requirement is fairly straightforward. If the claim is one for money damages, the plaintiff must be seeking more than \$75,000 in damages, exclusive of interest and costs. If the claim is for equitable relief, such as an injunction, the requirement is satisfied if either the potential value to the plaintiff or the potential burden on the defendant exceeds \$75,000.

24) When there are multiple claims or parties, however, the question arises as to whether parties may **aggregate** two or more smaller claims to achieve the \$75,000 amount in controversy. Three general rules address this question. First, a single plaintiff may aggregate claims against a single defendant, regardless of whether the claims are related in any way.

25) The rules are not as relaxed, however, when multiple parties are involved. A plaintiff may aggregate claims against multiple defendants only if the plaintiff is asserting that the defendants are **jointly and severally** liable, meaning that each defendant is potentially liable for the entire amount of the liability. Most tort law creates such joint and several liability.¹⁶ Conversely, multiple

¹⁵ 28 U.S.C.A. § 1332.

¹⁶ For example, suppose a plaintiff is in a car accident with two defendants and asserts negligence claims against both seeking \$100,000 in damages. If both are found to have been negligent and the plaintiff is awarded \$100,000, the plaintiff may recover any amount up to the judgment total from either defendant. If one defendant pays more than its fair share, it can obtain contribution from the other. Because the total amount sought exceeds \$75,000, the amount in controversy requirement is satisfied without the need to apportion the liability among the defendants and find one individual claim exceeding \$75,000.

plaintiffs may not aggregate claims against a single defendant unless the claims arise out of a common interest.¹⁷

3. Excluded Categories

26) There are certain categories of claims over which the federal courts will decline to exercise diversity jurisdiction, even though all of the requirements are satisfied. These are claims where the legal issues are so intensely local in nature that the federal courts have decided that it is preferable to have the state courts adjudicate them. The primary categories of claim where the federal courts will decline to exercise diversity jurisdiction are domestic relations cases (such as divorce, spousal support, and child support), probate matters, and certain real property disputes.

c. Supplemental Jurisdiction

27) For efficiency purposes, federal courts may exercise **supplemental jurisdiction** over claims that do not qualify for subject matter jurisdiction on their own but are sufficiently related to claims already proceeding in federal court. There are two requirements for the exercise of supplemental jurisdiction: 1) one claim over which the court has **original jurisdiction**—such as federal question jurisdiction or diversity jurisdiction; and 2) the claim over which the court will exercise supplemental jurisdiction arises out of the same **case or controversy** as the claim with original jurisdiction.¹⁸

d. Removal

28) When concurrent jurisdiction exists, a plaintiff may choose between state and federal court (simply by choosing in which court to file the complaint). A defendant has more limited rights to affect the choice of federal versus state court. If the plaintiff files the case in federal court, then the defendant is stuck in federal court (assuming subject matter jurisdiction properly existed). If the plaintiff picks state court, however, the defendant may **remove** the case to federal court if there is a basis for original subject matter jurisdiction over at least one claim.¹⁹

29) The removal process is hyper-technical, and requires great care. Removal is accomplished by filing a **Notice of Removal** in the federal court in the district where the state court is located, and a similar notice in the state court.²⁰ That notice automatically and immediately transfers the case to federal court and divests the state court of jurisdiction. The notice must be filed within 30 days of service of the complaint and summons, and all defendants who have been served must consent to or join in the notice.²¹

30) There is one important exception to the right to remove a case. Remember that diversity jurisdiction is designed to protect out-of-state parties from favoritism. With that purpose in mind, if a case is removable only on the basis of diversity jurisdiction, a defendant who is a resident of the forum state may not remove the case—the idea being that the out-of-state plaintiff could have

¹⁷ For example, if two plaintiffs assert common ownership of a piece of real estate valued at \$80,000, and the dispute involves the defendant's assertion of title to that land, the amount in controversy requirement is satisfied.

¹⁸ 28 U.S.C.A. § 1367.

¹⁹ 28 U.S.C.A. § 1441.

²⁰ 28 U.S.C.A. § 1446.

²¹ 28 U.S.C.A. § 1446(b).

filed in federal court but instead chose to file in state court, so the system does not need to protect that plaintiff from favoritism (and the defendant, being from the forum state, also does not need protection from favoritism).²²

Practice Tip

Removal is an extremely technical doctrine, and because removal involves the court's subject matter jurisdiction—or its power to maintain the case—courts construe the removal requirements strictly. Attorneys representing defendants in cases filed in state courts must make a prompt analysis of their potential option to remove the case, analyze the strategic advantages of state and federal court for the particular claims and defenses involved, coordinate with any other defendants, and, if they decide to remove, make certain to comply with all of the requirements—all in a very short period of time that cannot be extended.

31) A plaintiff who believes that the defendant has improperly removed a case may seek to **remand** the case back to the state court.²³ Unlike removal, which occurs automatically, remand requires a motion and favorable ruling by the federal court.

1. After-Acquired Jurisdiction

32) Sometimes, federal court subject matter jurisdiction does not exist for a complaint when filed, but subsequent events create a basis for subject matter jurisdiction. For example, if the only non-diverse defendant is removed from the case, such as by dismissal or amendment, diversity jurisdiction would then exist. A defendant may remove a case to federal court within 30 days of such **after-acquired jurisdiction**.

33) If the after-acquired jurisdiction is federal question jurisdiction (such as when the plaintiff amends the complaint to add a claim under a federal statute), there is no time limit on removal. If the only basis of after-acquired jurisdiction is diversity jurisdiction, however, a case may only be removed within one year of its original commencement.²⁴

2. Fraudulent Joinder

34) Because the choice of federal court versus state court can be extremely strategic and important—with different rules of procedure, different rules of evidence, different kinds of judges (some of whom are elected and some appointed), and dockets that move at different paces—plaintiffs are sometimes heavily motivated to proceed in state court. If the complaint contains a claim under a federal statute, either party may insist on federal court—the plaintiff by filing in federal court and the defendant by removing if the plaintiff chooses state court.

35) If the only basis for federal court subject matter jurisdiction is diversity jurisdiction, the plaintiff may have some control over the forum. If there are multiple potential defendants, some of whom are diverse from the plaintiff and others who are not, the plaintiff can make the federal courts available by naming only the diverse defendants. Conversely, a plaintiff preferring to litigate in state court can guarantee that forum by naming the non-diverse defendants, so long as the

²² See 28 U.S.C.A. § 1441(b)(2).

²³ 28 U.S.C.A. § 1447.

²⁴ 28 U.S.C.A. § 1446(c).

plaintiff has legitimate claims against the non-diverse defendants. If a plaintiff seeks to guarantee state court litigation by naming a non-diverse defendant against whom the plaintiff does not have a legitimate claim, however, a defendant may remove the case based on diversity jurisdiction, and the court will ignore the fraudulently joined defendant in its diversity jurisdiction analysis.

IV. Personal Jurisdiction

36) “**Personal jurisdiction**” refers to the protections in the United States Constitution for defendants against being forced to travel to remote jurisdictions to defend legal actions. It is an aspect of the **Due Process Clause** of the Constitution.²⁵ In contrast to subject matter jurisdiction, personal jurisdiction is waivable—if the defendant does not mind traveling to a remote jurisdiction to defend a case, the defendant may waive the objection to personal jurisdiction. The courts have recognized three primary sources of personal jurisdiction over a defendant.

a. Consent

37) A defendant may consent to personal jurisdiction. Contracts often include a **forum selection clause** that designates the court for disputes under the contract and provides that the parties consent to personal jurisdiction in that court. Such clauses are generally enforceable.

b. Presence

38) If a defendant is voluntarily within a jurisdiction when served with the complaint and summons, the court will have Constitutionally proper personal jurisdiction over that defendant.²⁶ This exercise of personal jurisdiction is sometimes referred to as “**tag**” jurisdiction.

c. State “Long Arm Statute”

39) Each state has a **Long Arm Statute**, which determines the out-of-state defendants who will be required to come to the state to defend lawsuits. Federal courts often apply the Long Arm Statute of the state in which they are located. A plaintiff seeking to sue an out of state defendant needs to consult the particular Long Arm Statute of the state where the plaintiff seeks to file the action.

40) In addition to analyzing the specific language of the Long Arm Statute, however, the plaintiff must also consider the Due Process limitations on the exercise of these Long Arm Statutes. The Supreme Court established the “**minimum contacts**” test to evaluate whether the exercise of jurisdiction over the defendant comports with “traditional notions of fair play and substantial justice.”²⁷ Under this test, courts look to see whether the defendant purposefully directed actions or commerce towards the forum state or its consumers, rendering it fair to require the defendant to appear and defend the action.

V. Venue

a. Venue Choices

²⁵ See U.S. Const. amend. V; U.S. Const. amend. XIV (extending the Due Process right to actions by the States).

²⁶ *Burnham v. Superior Court of California*, 495 U.S. 604, 110 S.Ct. 2105 (1990).

²⁷ *International Shoe Co. v. Washington*, 326 U.S. 310, 316, 66 S.Ct. 154 (1945).

41) **Venue** in the US court systems is a doctrine designed to make sure the forum that the plaintiff chooses has some logical connection to the dispute. While personal jurisdiction applies across an entire state, venue is particular to the individual district in which the court sits. A case may be dismissed or transferred if venue is lacking, even if the court has subject matter jurisdiction and personal jurisdiction. Like personal jurisdiction, though, venue is waivable by the defendants.

42) There are two primary venue provisions in federal court, plus a third “catch-all” that applies if neither of the primary provisions applies. The first primary provision is “residence based” venue. If all the defendants reside in the same *state*, then venue is proper in any *district* in which any of the defendants resides.²⁸ The second primary provision is “occurrence based” venue, which lies in any district in which a substantial part of the events or omissions giving rise to the claim occurred or, if the action involves a piece of property, in any district in which a substantial part of the property is situated.²⁹ In the unusual circumstance where neither primary venue option applies—such as when the defendants reside in different states and the occurrence took place outside the United States—then venue is proper in any district in which any defendant is subject to personal jurisdiction.³⁰

b. Venue Residence

43) “Residence” has its own particular meaning for purposes of venue. An individual is a resident of the district where the individual is domiciled. A corporation is a resident of every district where it is subject to personal jurisdiction. Partnerships and other unincorporated entities are treated like corporations for purposes of venue (in contrast to the citizenship analysis for diversity jurisdiction).³¹

c. Venue Transfer or Dismissal

44) The venue statutes and case law provide a number of challenges to venue, and define the court’s choices when ruling on such challenges. There are essentially three different forms of venue-based challenge. First, a defendant may contend that venue is improper in the forum the plaintiff has chosen. Second, a defendant may contend that, although venue is proper in the chosen forum, that forum is so inconvenient or illogical that the interest of justice mandates transfer to another forum. Third, where venue was proper and the forum is really inconvenient but transfer is not possible, a defendant may seek dismissal under a doctrine known as “*forum non conveniens*.”

1. Improper Venue

45) When a plaintiff has filed an action in a district in which venue is improper, the defendant may file a motion to dismiss the action.³² In that situation, the court may either dismiss the case or, in the interest of justice, transfer the case to another jurisdiction where it could originally have been brought (*i.e.*, another federal court that has subject matter jurisdiction, personal jurisdiction, and venue).³³

2. Transfer of Venue

²⁸ 28 U.S.C.A. § 1391(b)(1).

²⁹ 28 U.S.C.A. § 1391(b)(2).

³⁰ 28 U.S.C.A. § 1391(b)(3).

³¹ 28 U.S.C.A. § 1391(c).

³² See FED. R.CIV. P. 12(b)(3).

³³ 28 U.S.C.A. § 1406(a).

46) When a plaintiff has filed an action in a district in which venue is proper, the defendant may file a motion to transfer the action to another jurisdiction where it could originally have been brought (*i.e.*, another federal court that has subject matter jurisdiction, personal jurisdiction, and venue).³⁴ The court will consider the overall interests of justice in ruling on a motion to transfer, taking into consideration the convenience of the parties and witnesses. Courts generally consider transfer when the majority of the witnesses or evidence is located outside the district where the case is pending.

3. *Forum Non Conveniens*

47) Sometimes, a plaintiff has filed an action in a district in which venue is proper, but there is another much more logical forum to which transfer is not possible. Federal district courts can generally transfer cases only to other federal district courts. Thus, for example, if an incident occurs in a foreign country involving a defendant who resides in the United States, venue would be proper in the district where the defendant resides. If all the witnesses and evidence were located in the foreign country, the US federal court might conclude that the interests of justice dictate that the case proceed in that foreign country. The US federal court could not transfer the case into the foreign country's court system, so has the discretion to dismiss the case under the doctrine of *forum non conveniens*, allowing the plaintiff to refile the action in the foreign country.

VI. Choice of Law

48) When a federal court hears a case under its federal question jurisdiction, it has no difficulty determining which rules and laws apply—it will apply: the Federal Rules of Civil Procedure; federal statutes, treaties, and the Constitution; and any federal case law interpreting the federal statutes, treaties, and the Constitution.

49) When a federal court is adjudicating a state law claim under its diversity or supplemental jurisdiction, however, choosing the correct law is much more nuanced. The first decision point, sometimes referred to as “**vertical choice of law**” involves the choice as to whether to apply state law or federal law to each issue the court must resolve. In *Erie R. Co. v. Tompkins*,³⁵ the Supreme Court announced the answer to that question in an analysis that has come to be known as the “**Erie Doctrine**.” That doctrine holds that federal courts adjudicating state law claims will apply federal procedures and the state substantive law.

Practice Tip

While the doctrine is easy to understand in many examples, it gets more difficult in the gray area. For example, if the claim is a negligence claim, the federal court will apply state law regarding the elements of negligence. Conversely, the federal court will apply federal procedural rules regarding the format for the pleadings. Issues like the time for commencing the action arguably have both substantive and procedural elements, and require situation-specific research.

³⁴ 28 U.S.C.A. § 1404(a).

³⁵ 304 U.S. 64, 58 S.Ct. 817 (1938).

50) For the issues in federal court that are controlled by state law, the next question is which state's laws apply. Suppose, for example, a plaintiff files suit in federal court in Virginia regarding an accident that occurred in North Carolina. Does the court apply Virginia or North Carolina substantive law? That question is sometimes referred to as "**horizontal choice of law.**" Each state has a choice of law statute that contains the rules for choosing which state's laws to apply in actions filed in the state court systems. Federal courts borrow the choice of law provision from the state in which they are located. Thus, in the above example, the Virginia federal court would apply the state substantive law dictated by Virginia's choice of law statute.

C. The Pleadings

51) The pleadings are the papers that commence the lawsuit and frame the dispute. The **complaint** is the document that sets forth the plaintiff's claims, and the **answer** is the document that responds to those claims and sets forth the defendant's defenses. **Pleading** is a term of art that only applies to the limited papers setting forth the claims and defenses, not to motions, briefs, discovery requests, and all the other court papers that the parties file and serve during the course of a typical litigation matter.³⁶ This section will discuss the pleadings and preliminary challenges to the complaint.

I. Commencing a Lawsuit

52) Two steps are required to commence a lawsuit in federal court. First, the plaintiff must draft and file a **complaint**—the legal document setting forth the parties and the claims. Second, the plaintiff must **serve** the complaint and a **summons**—the legal **process** that brings the defendant into the lawsuit and requires the defendant to appear and defend the claims.

a. Complaint

53) The Federal Rules of Civil Procedure establish a number of technical requirements for a federal court complaint.

1. Caption

54) The top of the first page contains a **caption**—a header that identifies the court, the parties, and the **docket number**—a unique identifier for the court's record keeping system.³⁷ The caption for the complaint must name all parties, but subsequent court papers may use a shortened version that lists the first-named party only, followed by "et al." to signify the omitted parties. Each pleading must contain a title, which is located directly below the caption. The title of the complaint is typically simply "Complaint," but may be more elaborate.

2. Body of the Complaint

55) The body of the complaint is set forth in numbered paragraphs, with each paragraph to contain a "single set of circumstances."³⁸ The body of the complaint must set forth three areas of content: a statement of the court's jurisdiction, a statement of the claims showing the plaintiff is entitled to relief, and a statement of the relief sought.

³⁶ FED. R.CIV. P. 7.

³⁷ FED. R.CIV. P. 10(a).

³⁸ FED. R.CIV. P. 10(b).

i. Statement of Jurisdiction

56) The complaint typically starts with a statement of the basis for the court’s subject matter jurisdiction—typically some combination of federal question, diversity, and supplemental jurisdiction (as discussed above).³⁹ To support federal question jurisdiction, a complaint will typically reference the federal question jurisdiction statute and identify the federal law under which the plaintiff asserts a claim. To support diversity jurisdiction, a complaint will typically set forth the facts necessary to determine the parties’ citizenship and to establish the requisite amount in controversy.

ii. Statement of Claims

57) The primary content of the complaint is the statement of the claims entitling the plaintiff to relief.⁴⁰ Federal courts use **notice pleading**, a standard designed to put the defendant on notice of the claims asserted against it, but not requiring the plaintiff to plead every fact that supports the claims. The Supreme Court has provided some guidance as to the minimum degree of detail necessary to satisfy the notice pleading standard—a complaint must contain sufficient facts such that each element of each claim is “plausible.”⁴¹ This **plausibility standard** is not precisely defined, but it lies somewhere between possible and probable. The plausibility standard defines the minimum content required; plaintiffs sometimes make the strategic decision to include more detail than that bare minimum. If a complaint contains more than one claim, the claims are typically organized into **counts**.⁴²

iii. Statement of Relief

58) The body of the complaint typically ends with a statement of the relief the plaintiff seeks—money damages, injunctive relief, etc.⁴³ The request for relief is often found in a “**wherefore clause**,”—a concluding paragraph that starts, “WHEREFORE, the plaintiff requests ...” Each count might contain its own wherefore clause, or all of the relief might be requested in one wherefore clause at the end of the complaint.

Practice Tip

Plaintiffs often include a catch-all request for “whatever relief the court deems appropriate,” in order to provide the court with leeway to accord some component of relief not specifically requested.

3. Signature; Rule 11

59) The complaint ends with a signature **block**—a signature line for the attorney of record, which includes the contact information for the attorney. The signature requirement is found in **Rule 11**,⁴⁴ which not only requires that each court paper be signed by an attorney (or by the party

³⁹ FED. R.CIV. P. 8(a)(1).

⁴⁰ FED. R.CIV. P. 8(a)(2).

⁴¹ *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007).

⁴² FED. R.CIV. P. 10(b).

⁴³ FED. R.CIV. P. 8(a)(3).

⁴⁴ FED. R.CIV. P. 11.

if the party is proceeding *pro se*—representing itself), but establishes sanctions for bad faith signatures.

60) Rule 11 provides that a signature on a court filing certifies to the court that the legal positions in the document are supported by existing law or a non-frivolous argument for a change in the law and that the factual contentions and denials are made in good faith after investigation. Rule 11 also establishes procedures for imposing sanctions on the attorney, the party, or both. Opposing parties may seek sanctions by motion. To do so, they first provide a copy of the motion to the lawyer who filed the potentially improper document, and then wait 21 days before filing the motion to provide the other side with an opportunity to correct the violation. Even in the absence of a motion, the court may impose sanctions *sua sponte* (on its own), after providing notice to the party to be sanctioned and providing it with an opportunity to justify its filing.

61) Sanctions under Rule 11 must promote deterrence, not punishment. They can include the costs and fees incurred by opposing parties as a result of the improper filing, educational requirements, and other creative sanctions designed to prevent recurrence of the conduct.

4. Claims Included in the Complaint

62) The Rules contain requirements and limitations regarding the types of claims that may be originally included in, or added to, a single lawsuit. Rule 18 is the most important rule regarding the combining of multiple claims in a single action. It provides that once a party has asserted one claim against a defending party, it may assert any other claims it has against that party, even if completely unrelated to the first claim.⁴⁵ Thus, a plaintiff may include in one complaint a tort claim and an unrelated breach of contract claim against the same defendant. Remember, though, that each claim must satisfy subject matter jurisdiction, personal jurisdiction, and venue, as discussed above.

63) A discussion of all of the various types of claim that a plaintiff may bring in federal court is beyond the scope of this chapter. One category of claims warrants inclusion, though: claims seeking injunctive relief. An **injunction** is an order that a defendant refrain from taking some action or that a defendant take some action (sometimes referred to as a “**mandatory injunction**”). Injunctions are potentially available in three durations.

i. Temporary Restraining Orders

64) In cases with extreme time sensitivity regarding the action sought to be enjoined, a plaintiff may seek a very short-term injunction known as a “**temporary restraining order**” or “**TRO**.” The idea behind a TRO is essentially an emergency order to preserve the status quo until a more full hearing can occur. Some of the due process safeguards that apply to most federal court litigation are relaxed in the context of a TRO, and for that reason the duration is limited to 14 days.⁴⁶

65) Because of the emergency nature of a TRO, a court can issue a TRO without providing the defendant with notice and an opportunity to appear, so long as the plaintiff has made a good faith effort to provide notice to the defendant. A court will issue a TRO when the following five elements are satisfied: 1) the injunction is necessary to prevent substantial harm that cannot be

⁴⁵ FED. R.CIV. P. 18.

⁴⁶ FED. R.CIV. P. 65(b).

remedied by money damages (sometimes referred to as “no adequate remedy at law”); 2) greater harm would result from denying the injunction than from issuing it; 3) the moving party has a substantive right to the relief (sometimes referred to as “likelihood of success on the merits”); 4) the injunction is narrowly tailored to the redress the harm; and 5) the injunction will not harm the public.

66) If the plaintiff persuades the court to issue a TRO, the court will require the plaintiff to post a bond or other form of security to protect the defendant in the event that the court ultimately rules that injunctive relief was not proper.⁴⁷

ii. Preliminary Injunctions

67) The more common, and less extreme, form of temporary injunctive relief is known as a “**preliminary injunction.**” Like a TRO, a preliminary injunction is designed to preserve the status quo until the final hearing on the request for injunctive relief can occur. A court may not issue a preliminary injunction without ensuring that the defendant has notice and an opportunity to be heard, and accordingly permanent injunctions do not contain a time limits like that for TROs.⁴⁸ The requirements for a preliminary injunction are similar to those for a TRO.

68) Like with a TRO, if the court issues a preliminary injunction, it will require the plaintiff to post a bond or other form of security to protect the defendant in the event that the court ultimately rules that injunctive relief was not proper.

iii. Permanent Injunctions

69) The permanent injunction is the court’s final ruling if it grants the request for injunctive relief. The requirements are similar to those for a TRO or preliminary injunction, except the court does not evaluate the likelihood of ultimate success on the merits, it determines the merits. Because the permanent injunction is the end of the litigation process on that claim, the court does not require the plaintiff to post security.⁴⁹

70) Sometimes it is inefficient to conduct two hearings on the same request for injunctive relief, one in the context of a preliminary injunction and one in the context of the request for a permanent injunction. Accordingly, the court may collapse the two into one hearing conducted at the preliminary injunction stage.⁵⁰

5. Parties Included in the Complaint

71) The Rules are more restrictive about the parties that may be included in a single action than they are about claims that may be included. In order for a plaintiff to name multiple defendants in one complaint, the plaintiff must assert claims against each defendant that arise out of the same “transaction or occurrence, or series of transactions or occurrences” and there must be a question of fact or law common to all defendants.⁵¹ Once the plaintiff has asserted a claim against each defendant that meets these requirements, the plaintiff may join other unrelated claims under

⁴⁷ FED. R.CIV. P. 65(c).

⁴⁸ FED. R.CIV. P. 65(a).

⁴⁹ FED. R.CIV. P. 65(c).

⁵⁰ FED. R.CIV. P. 65(a)(2).

⁵¹ FED. R.CIV. P. 20(a)(2).

Rule 18. Parallel limitations apply when multiple plaintiffs want to join together in a single complaint.⁵²

i. Class Actions

72) The Federal Rules of Civil Procedure authorize **class actions** where the number of parties (typically plaintiffs) is so large that it is impractical to prosecute each claim individually.⁵³ Often, class actions involve situations where a defendant's business practices have harmed many consumers, but in an amount so small that renders formal litigation by any individual member uneconomic.

73) Class actions list the **class representatives** as the named parties, suing on their own behalf and on behalf of other unnamed class members. The action does not automatically proceed as a class action. Rather, it starts as a **putative class**, and does not become a true class action until the court **certifies the class**.

74) In the certification process, the court will consider whether the class is truly too large to proceed individually, whether there is sufficient commonality among the class members, whether the class representatives are typical of the other class members, and whether the class members and their attorneys are qualified to represent the interests of the class.

75) Once certified, the court exercises a degree of control over a class action that differs from most other litigation. Of particular note, settlements and attorney's fee arrangements must be approved by the court, with the court ensuring that the representatives and attorneys do not enrich themselves at the expense of the class members.

b. Summons

76) The complaint does not actually require the defendant to participate in the lawsuit. Rather, the document that **attaches** the defendant and requires the defendant to appear and defend is the **summons**. The summons is a short, preprinted form that is available on most courts' websites.

C. Service of Process

77) After the complaint is filed, the plaintiff must arrange to have the complaint and the summons served within 90 days.⁵⁴ This service, called "**service of process**," can occur in a number of different manners.

1. Waiver of Service

78) The Federal Rules of Civil Procedure contain a **waiver of service** procedure.⁵⁵ The plaintiff sends a request to the defendant asking the defendant to waive formal service. If the defendant agrees (by returning the signed waiver), it gets 60 days to respond to the complaint, increased from the normal 21 days. If the defendant does not sign the waiver, the plaintiff must **perfect** (perform) formal service, and can then recover the costs of that service from the defendant unless the defendant had good cause to decline the request.

⁵² FED. R.CIV. P. 20(a)(1).

⁵³ FED. R.CIV. P. 23.

⁵⁴ FED. R.CIV. P. 4(m).

⁵⁵ FED. R.CIV. P. 4(d).

Practice Tip

Waiver requests are quite common, and it is also quite common to grant the waiver. Indeed, the rules strongly incentivize such cooperation, and to refuse to waive service not only risks bearing the costs of service but also sets an uncooperative tone for the rest of the litigation.

2. Service on a Corporation

79) Most states require a corporation or other business entity to designate a **registered agent for service of process** as requirement for registering to do business in the state. Service of process occurs for such entities merely by delivering the complaint and summons to that agent.

Practice Tip

Many companies use a corporation called “CT Corporation” as their registered agent for service of process. Sending the complaint and summons to CT Corporation will typically result in successful service of process. Upon receipt, CT Corporation forwards the documents to the party, who can then arrange for counsel and defend itself.

3. Service on an Individual

80) Service on an individual is more complicated than service on a corporation. The gold standard for service on an individual is **personal service**, in which a non-party over the age of 18 hands the complaint and summons to the defendant. **Abode service** is another option, in which the complaint and summons is left at the defendant’s dwelling with a person of suitable age and discretion who also lives there.

4. Service by Means Authorized in State Court

81) The Federal Rules of Civil Procedure also authorize service by any means authorized by the rules of procedure in the state where the federal court is located. Thus, for a case pending in federal court in Ohio, a plaintiff may serve the complaint and summons by certified mail if the Ohio rules authorize such service.

5. Service by Extraordinary Means

82) When the normal forms of formal service are ineffective, a plaintiff may request that the court authorize other means of service of process. Thus, for example, if a plaintiff cannot locate a defendant despite good faith efforts, the court might authorize service by notice in a newspaper and by mail to the defendant’s last known address.

II. Responding to the Complaint

83) A defendant generally has two options when served with a complaint and summons. First, it may file a motion challenging various aspects of the complaint. Second, it may file an answer, admitting and denying the allegations in the complaint. Additionally, in conjunction with the answer, a defendant may assert a variety of claims back against the plaintiff or against other parties.

a. Time for Responding to a Complaint

84) Defendants must either answer or file a motion to dismiss within 21 days after they are served with the complaint and summons (although extensions of time by agreement of counsel are quite common).⁵⁶ If a defendant has accepted the plaintiff's request for waiver of service, the time for the defendant's response is extended to 60 days. If the defendant files a motion to dismiss, the time for filing the answer is delayed until 14 days after the court denies the motion (no answer being required if the court grants the motion).

1. Failure to Respond to a Complaint

85) If a defendant fails to respond to a complaint within the time allowed, the plaintiff may seek a **default judgment**.⁵⁷ There are two steps to obtaining a default judgment. First, the plaintiff obtains a **default** from the clerk of court. This is a purely ministerial process, and the clerk's office automatically enters the default if the plaintiff submits evidence of failure to respond, typically in the form of an affidavit.

86) To collect money from the defendant or obtain other relief, however, a plaintiff needs to complete step two, obtaining a default judgment. The procedure for a default judgment depends on the nature of the relief sought. If the complaint seeks a sum certain—like in a breach of contract case—the clerk's office may also enter the default judgment. However, if the complaint seeks damages that are not readily susceptible of a mathematical calculation—like pain and suffering—or equitable relief, the plaintiff must file a motion for default judgment. The judge will then rule on the motion and award the relief the judge deems appropriate.

Practice Tip

Default judgment is a very harsh result. Accordingly, if a defendant defaults inadvertently, the courts are generally receptive to a motion to open or strike the default judgment. A defendant should file a motion to set aside the default as soon as possible and explain the circumstances leading to the failure to respond to the complaint.

b. Motions to Dismiss

87) The primary mechanism for challenging the adequacy of a complaint is by **motion to dismiss**. Rule 12(b) of the Federal Rules of Civil Procedure authorizes motions to dismiss for lack of subject matter jurisdiction, lack of personal jurisdiction, lack of venue, defects in service of process, failure to properly set forth a claim entitling the plaintiff to relief, and failure to join a necessary

⁵⁶ FED. R.CIV. P. 12(a)(1)(A).

⁵⁷ FED. R.CIV. P. 55.

party.⁵⁸ Additionally, a defendant may move to strike portions of the complaint that are egregious and may ask the court to require the plaintiff to amend the complaint to add more detail.⁵⁹

1. Failure to State a Claim

88) The most common and most important Rule 12 challenge is a **motion to dismiss for failure to state** a claim under **Rule 12(b)(6)**. Such a motion may contend that the complaint does not contain sufficient factual detail to meet the plausibility standard (discussed above) or that the applicable law does not support the plaintiff's request for relief.

89) In general, a motion to dismiss for failure to state a claim is evaluated solely on the basis of the **four corners of the complaint**—the allegations in the complaint, which are taken as true at this early stage of the process. The plaintiff does not need to identify the evidence to be used to prove the allegations, and the court does not assess the plaintiff's likelihood of prevailing or of proving its allegations true. The idea is that the discovery process is where the evidence is gathered, and a case may proceed to discovery so long as the plaintiff can meet the plausibility pleading standard.

Practice Tip

Federal courts prefer to have cases adjudicated on the merits, not on technicalities. Accordingly, if the defendant files a motion to dismiss and the plaintiff believes it can cure the deficiencies raised in the motion, the plaintiff can request leave to amend the complaint (as discussed below). Such motions are commonly granted.

2. Waiver of Rule 12 Defenses

90) Many of the early challenges to a complaint must be asserted at the outset or they are waived.⁶⁰ If these defenses are not asserted either in a Rule 12 motion or in the answer, they are lost. Furthermore, if the defendant asserts any of the Rule 12 defenses in a Rule 12 motion, it waives any other Rule 12 defenses it does not also include in the motion. The reason for these waiver provisions is both efficiency and to prevent the defendant from seeing how the case is going, and then asserting these defenses if the defendant gets some unfavorable rulings from the judge.

91) There are a few defenses that are not waived in this manner. Subject matter jurisdiction may be raised at any time, even on appeal following trial. Failure to state a claim and failure to join a necessary party are also excluded from the waiver rules.⁶¹

c. Answer

92) Unless the case is dismissed or settled, the defendant eventually must file an **answer** to the complaint. The answer must contain two components. First, it must respond to the

⁵⁸ FED. R.CIV. P. 12(b)(1)-(7).

⁵⁹ FED. R.CIV. P. 12(e) and (f).

⁶⁰ See FED. R.CIV. P. 12(g) and (h).

⁶¹ FED. R.CIV. P. 12(h).

allegations in the complaint, admitting the allegations that the defendant agrees are true, denying the allegations that the defendant contends are false, and denying allegations that, following a good faith investigation, the defendant lacks sufficient information to admit or deny.⁶²

Practice Tip

The answer is typically organized to mirror the complaint, with a numbered paragraph in the answer to correspond to each numbered paragraph in the complaint. Paragraphs in complaints often contain a number of allegations. The Rules explicitly prohibit a defendant from denying the entire paragraph based upon one small aspect that the defendant denies.⁶³ Accordingly, the answering paragraphs often include a combination of admissions and denials. Because facts not denied are deemed admitted, the better practice is to admit those facts the defendant does not contest and then deny all facts not specifically admitted.

93) In addition to responding to the allegations in the complaint, an answer must also set forth the defendant's **affirmative defenses**.⁶⁴ Affirmative defenses are often referred to as "yes, but" defenses, where the defendant is offering an excuse for the alleged conduct. For example, if the allegation was the tort of battery—an offensive touching—the defendant might assert consent as an affirmative defense; "yes I touched you, but I had your consent so it was not a battery." Rule 8(c) contains a list of commonly asserted affirmative defenses.

d. Additional Claims by the Defendants

94) In addition to answering the allegations in the complaint, a defendant may assert a variety of claims, both for contribution towards the liabilities asserted against that defendant and for affirmative additional relief.

1. Counterclaims

95) A defendant may assert claims back against the plaintiff, and these claims are called "counterclaims." There are two categories of counterclaims: **compulsory counterclaims** and **permissive counterclaims**. A compulsory counterclaim is one that arises out of the same transaction or occurrence as the claim asserted by the plaintiff against the defendant.⁶⁵ A defendant must assert all compulsory counterclaims or they are waived. The idea behind this rule is that it is more efficient to adjudicate all claims related to a single incident or transaction in one action, rather than a series of actions.

⁶² FED. R.CIV. P. 8(b).

⁶³ FED. R.CIV. P. 8(b)(4).

⁶⁴ FED. R.CIV. P. 8(c).

⁶⁵ FED. R.CIV. P. 13(a)(1). One exception is that a claim that the defendant had already filed against the plaintiff in another action does not become a compulsory counterclaim when the plaintiff files the action against the defendant. Another exception is that, if a counterclaim would require joining a party over whom the court does not have jurisdiction, the counterclaim will not be considered compulsory. FED. R.CIV. P. 13(a)(2).

96) Any claims that the defendant has against the plaintiff that do not arise out of the same transaction or occurrence are permissive counterclaims.⁶⁶ The defendant may, but is not required to, assert any permissive counterclaims, or may save them for a later action.

97) Remember that the court must have subject matter jurisdiction, personal jurisdiction, and venue for each claim. These requirements will not be difficult to satisfy for compulsory counterclaims, which will almost certainly qualify for supplemental jurisdiction, but may prohibit some permissive counterclaims.

2. Crossclaims

98) If there are multiple defendants, one defendant may want to assert a claim against another defendant. Such claims are called “**crossclaims.**” A crossclaim must arise out of the same transaction or occurrence as the original claim the plaintiff asserted against the defendant asserting the crossclaim.⁶⁷ All crossclaims are permissive.

Practice Tip

A crossclaim requires one defendant to prove its claim against another defendant. Defendants often believe that asserting crossclaims and developing evidence against each other is “doing the plaintiffs’ work for them,” and will agree among themselves not to file crossclaims, relying on their permissive nature.

99) Once a defendant has asserted one crossclaim against another defendant, Rule 18 allows the defendant to assert any claims it has against that defendant, whether or not related to the original claim in the case. However, the defendant will need an independent basis for subject matter jurisdiction over any unrelated claims.

3. Third-Party Claims

100) Plaintiffs often have the ability to sue some, but not all, of the defendants involved in an incident. Particularly in tort actions where **joint and several liability** exists—such that each defendant is potentially liable for the entire liability to the plaintiff and then entitled to contribution from other tortfeasors—a plaintiff may only choose to sue the defendants with “deep pockets”—lots of money—or who are clearly liable. Such defendants may want to assert contribution claims against some of the other tortfeasors that the plaintiff chose not to include. In such circumstances, a defendant has the right to **implead** or join additional defendants into the action.

101) Third party practice proceeds much like the original complaint and answer process, but with its own nomenclature. The defendant impleading a defendant is called a “third-party plaintiff” and the newly joined defendant is a “third-party defendant.” The defendant may file a

⁶⁶ FED. R.CIV. P. 13(b).

⁶⁷ FED. R.CIV. P. 13(g). The crossclaim may, but is not required to, include a claim for contribution from the co-defendant.

motion to dismiss or answer to the third-party complaint, and may assert counterclaims, crossclaims, and their own “fourth-party complaints.”

III. Amending Pleadings

102) The pleadings control the issues that are, and are not, in the case. Parties are not irrevocably bound by the pleadings, however, and may request leave to amend them. In general, courts liberally allow amended pleadings “when justice so requires,” and only deny a motion to amend if amendment would prejudice other parties.⁶⁸ “Prejudice” in this sense means that the **delay** in including the new allegations in the complaint has caused harm to the other party, not that the other party is disadvantaged by the new allegations.

a. Relation Back

103) The only complex aspect of amendment involves the **statute of limitations**—the statute that sets the last date by which a complaint must be filed. If the original complaint was filed within the statute of limitations period but the amendment is filed after the period has “run” or lapsed, the court must determine whether the amended complaint **relates back** to the original complaint—is deemed to have been filed on the date of the original complaint.

104) When an amended complaint seeks to add a new claim against a party already named in the original complaint, the amended complaint will relate back if the new claim arises out of the same transaction or occurrence set out, or attempted to be set out, in the original complaint.⁶⁹

105) If the amended complaint seeks to add a new party, the test for relation back is much more difficult to satisfy. The new claim must arise out of the same transaction or occurrence set out, or attempted to be set out, in the original complaint and two additional things must occur within 90 days of the filing of the original complaint: 1) the new defendant must receive notice of the claims and 2) the new defendant must know that, but for a mistake in identity by the plaintiff, the new defendant would have been included in the original complaint.

D. Case Management

106) As a case proceeds through the litigation process, the judge who is randomly assigned to the case may conduct conferences with the parties’ lawyers and may issue orders setting the deadlines and other parameters to control the orderly operation of the action.⁷⁰ The judge must enter an initial **Case Management Order** near the beginning of the case establishing, among other things, deadlines for completing discovery, adding new parties, and amending the pleadings. The initial case management order typically extends through discovery and summary judgment, but does not set the trial date (because the deadlines change so often that it is not practical to try to set a trial that early in the process). Many judges will then set another conference after discovery is completed to map out the remaining activities until the time of trial. Depending on the complexity and duration of the case, the judge may set additional pretrial conferences.

⁶⁸ FED. R.CIV. P. 15.

⁶⁹ FED. R.CIV. P. 15(c).

⁷⁰ FED. R.CIV. P. 16.

107) Shortly before trial, the judge will typically hold a **final pretrial conference**. At that final conference, the judge will discuss the witnesses and exhibits the parties plan to offer at trial, procedures for the jury, if the case is a jury trial case, and other trial logistics.

I. Settlement

108) Settlement is a frequent topic of discussion at most pretrial conferences. The judge may ask the lawyers to describe any settlement negotiations that have already occurred and to give their views on settlement prospects. The judge may offer to help mediate the settlement discussions. Many judges are reluctant to get involved in the settlement discussions, however, for fear that they cannot perform that function without creating the appearance that they are no longer neutral or unbiased—particularly in non-jury proceedings where the judge will be the ultimate fact finder. Accordingly, many judges will offer to assign a magistrate judge to mediate settlement discussions or to refer the case to a private mediator.

109) Additionally, many courts have local rules that require the parties to participate in some form of **alternative dispute resolution**, or **ADR**, at some specified point in the litigation process. Common forms of ADR are **mediation** (in which a professional mediator, who has no power to make rulings or decide a winner and a loser, facilitates settlement discussion between the parties), **non-binding arbitration** (in which the parties conduct a very short trial—often less than one day with perhaps one witness per side—and the arbitrator makes a non-binding ruling that may help the parties understand their litigation risks and be more likely to compromise), and **early neutral evaluation** (where the parties present some threshold issue to a neutral with extensive experience who provides a sense of how a court would be likely to rule, again to help the parties understand their litigation risks and be more likely to compromise).

E. Discovery

110) The majority of the time and money in most complex federal court litigation is incurred in the discovery process. Discovery in U.S. federal courts, and in most U.S. state courts, is fundamentally different from discovery in most other countries. Discovery is quite expansive, and is primarily conducted with very little judicial involvement. Federal courts have two primary categories of discovery procedures: automatic disclosures and discretionary discovery devices. This section will discuss both types of discovery.

I. Discovery Planning Conference

111) With one narrow exception discussed below, the parties may not conduct any discovery until they have conducted a discovery planning conference.⁷¹ At that conference, the parties meet and try to reach agreement about the parameters of the discovery process, such as how long discovery will last, whether to use the default limits on the number of interrogatories and depositions, whether discovery will be phased in any manner.

112) One topic of increasing importance in the discovery conference is the manner of handling electronic discovery. **Electronically Stored Information**, or **ESI**, is now often the most expensive and problematic aspect of discovery. For larger, more complex cases, parties often hire ESI consultants who collect and process the ESI. At the discovery conference, the parties discuss the

⁷¹ FED. R.CIV. P. 26(f).

format for production of ESI (such as pdf, jpeg, tiff, etc.), whether they will produce metadata (the hidden data about files that many programs store, such as the date of creation and the author), the identity of the record custodians whose files will be searched, and the manner and terms for searching. The parties then file a **discovery report** with the court reporting on their agreements and their positions on issues upon which they could not agree. Most courts have forms for the discovery report on their websites.

II. The Scope of Discovery

113) All discovery in federal courts is governed by one common definition of the scope of discovery. Parties may discover any documents or information that are: 1) not privileged; 2) relevant to any party's claims or defenses; and 3) proportional to the needs of the case (which entails balancing the expected benefits and burdens of the discovery, using factors set forth in Rule 26(b)(1)).⁷²

114) The rules also limit discovery that is unduly burdensome, harassing, or cumulative.⁷³ A party believing that an individual discovery request is problematic may object to the individual request. A party seeking broader protection from certain kinds of discovery may seek a **protective order** from the court.⁷⁴

III. Privileges

115) A variety of privileges shield certain information from discovery. Although there are a variety of privileges that apply in very specific narrow circumstances, the two most common privileges in federal court are the attorney-client privilege and the protection for trial preparation materials.

a. Attorney-Client Privilege

116) Communications between lawyers and their clients are privileged and not discoverable. Although the precise elements of the privilege vary from jurisdiction to jurisdiction, they generally follow a similar pattern, covering communications between a lawyer and client made in confidence for the purpose of obtaining legal advice. If the privileged information is disclosed to third parties the privilege will be waived for that information, and potentially for all information in the same subject matter.

b. Trial Preparation Materials

117) The protection for **trial preparation materials**, sometimes called **work product**, is found in Rule 26(b)(3) and is consistent across all the federal courts.⁷⁵ It protects documents (but not oral communications) prepared in anticipation of litigation by a party or its representative (and thus does not require a lawyer's involvement). This protection is not absolute—if an opposing party has a substantial need for the information and cannot obtain the equivalent information from another source, it may obtain the trial preparation materials. In that circumstance, the producing party may

⁷² FED. R.CIV. P. 26(b)(1).

⁷³ FED. R.CIV. P. 26(b)(2).

⁷⁴ FED. R.CIV. P. 26(c).

⁷⁵ FED. R.CIV. P. 26(b)(1).

⁷⁵ FED. R.CIV. P. 26(b)(3).

redact any legal impressions from the document. For example, if a party took photographs of the scene of an accident, and then time and weather changed the scene before an opposing party could examine the scene, the opposing party could likely obtain the photographs.

c. Privilege Log

118) A party who withholds a document on the basis of privilege must notify the requesting party and describe the document in sufficient detail that the requesting party and the court can assess the privilege assertion (but without actually disclosing the privileged information). The most common mechanism for providing this information is a **privilege log**, a document that lists each privileged document and provides for each document information like the date it was created, the author, all recipients, a description of the document, and the privilege or privileges asserted.

119) The explosion in Electronically Stored Information has caused an attendant increase in the frequency of inadvertent production of privileged documents—in the gigabytes or terabytes of ESI that parties produce, it is common to miss some privileged documents. The Rules contain a provision, sometimes referred to as a “**claw back**” provision, designed to allow a party to request that an opposing party return an inadvertently produced privileged document.⁷⁶ Once a party invokes the provision, opposing parties must return, destroy, or sequester the allegedly privileged documents. If they believe the documents are not actually privileged, they may petition the court to determine the privilege status for the documents.

IV. Automatic Disclosures

120) Although the majority of discovery in federal court occurs by affirmative request by the parties, the Rules also require each party to disclose certain information without a triggering request from an opposing party, either on dates set by the court or the default dates established in the Rules. There are three automatic disclosures, the initial disclosure, the expert disclosure, and the pretrial disclosure.

a. Initial Disclosure

121) In the initial disclosure, each party discloses the fact witnesses and documents that the party may use to support its own claims or defenses. There is no obligation to disclose witnesses or documents that are adverse to the disclosing party, although that information may often be obtained through one of the affirmative discovery devices. Additionally, each party must disclose information about insurance that might be available to cover claims against that party and information about the damages that party seeks (a calculation of the amount and the supporting documents).⁷⁷

122) The initial disclosure occurs either 14 days after the parties conduct their discovery conference under Rule 26(f) or on the date set by the judge, if the judge sets a date in the case management order. The consequence of failing to disclose a witness, document, or other piece of information required in the initial disclosure is that the party may not use that witness, document, or information at trial.⁷⁸

⁷⁶ FED. R.CIV. P. 26(b)(5)(B).

⁷⁷ FED. R.CIV. P. 26(a)(1).

⁷⁸ FED. R.CIV. P. 37(c).

b. Expert Disclosure

123) The expert disclosure is designed to provide opposing parties with information about the expert opinions the party intends to offer. In the US federal courts, **fact** or **percipient witnesses** may testify about their personal observations related to the dispute being litigated. Only expert witnesses may provide **opinion testimony**.

124) The nature of the disclosure depends on the nature of the expert. The classic expert is one that a party engages to provide opinions for the pending litigation. For such witnesses, each party must disclose an **expert report**. An expert report is a document signed by, and typically authored by, the expert which describes: the expert's opinions; the bases for those opinions; the expert's qualifications, prior testimony, and publications; and the rate that the expert charged for the opinions.⁷⁹

125) Sometimes a party intends to offer testimony from an expert who has not been engaged in the normal fashion. A treating physician is a common example—the physician treated the plaintiff and has information and opinions about the plaintiff's medical condition, but the plaintiff did not separately engage the physician as an expert witness. For such experts, the party must disclose a summary of the expert's opinions, but not a full expert report.

126) Finally, parties sometimes use **consulting experts**—experts who advise the party or the party's attorney about issues in the case but who will not testify at trial. The rules shield such experts from discovery altogether.

Practice Tip

A common strategy is to engage all experts as consulting experts initially. At the appropriate time, when expert disclosures are due, the lawyer can then convert those experts the lawyer intends to call at trial into testifying experts, and make the appropriate disclosures. Experts who the lawyer decides not to call, for strategic or other reasons, remain consulting experts shielded from discovery.

127) Expert disclosures are due 90 days before the trial date, or at such other time set by the court. As with the initial disclosure, the sanction for failing to properly disclose an expert or an opinion is exclusion of the expert or opinion.⁸⁰

c. Pretrial Disclosure

128) The final disclosure is the pretrial disclosure, in which each party discloses the witnesses, exhibits, and deposition testimony the party intends to use at trial. In order to account for the overly protective listing of every potential witness and exhibit, the Rule requires that parties disclose separately the witnesses and exhibits they "expect" to use and those they "may" use.⁸¹

⁷⁹ FED. R.CIV. P. 26(a)(2).

⁸⁰ FED. R.CIV. P. 37(c).

⁸¹ FED. R.CIV. P. 26(a)(3).

129) Pretrial disclosures are due 30 days before the trial date, or at such other time set by the court. As with the other disclosures, the sanction for failing to properly disclose a witness, exhibit, or deposition testimony is exclusion.⁸²

V. Discretionary Discovery

130) In addition to the automatic disclosures, the Rules establish a number of discretionary discovery devices a party may use to obtain information related to the dispute. The following sections describe those devices.

a. Interrogatories

131) The Rules authorize parties to serve interrogatories on each other.⁸³ An **interrogatory** is simply a written question. Interrogatories may pertain the facts in dispute, or may inquire about an opposing party's contentions about how the law applies to the facts, sometimes called "**contention interrogatories.**" Each party may serve up to 25 interrogatories on each other party.

132) In limited circumstances, the responding party may refer the requesting party to documents in lieu of answering an interrogatory. A party may only do so, however, when the responsive information is contained in the documents that the responding party identifies, and the burden of finding the responsive information is equal for both parties.⁸⁴

133) Interrogatories are **served** upon opposing parties (typically by email), but are not **filed** with the court. They may be served at any time after the parties' discovery conference and at least 30 days before the end of the discovery period. The recipient must then respond within 30 days (although extensions of time are common). The response may include objections to the interrogatories interposed by the lawyers and responsive information (provided by the party but typically drafted by the lawyers).

Practice Tip

Because interrogatories are drafted by lawyers and responded to—often quite carefully—by lawyers, they can consume significant resources without commensurate gain. Accordingly, interrogatories are generally most useful for obtaining very specific pieces of information that a witness would be unlikely to recall during a deposition.

b. Requests for Inspection

134) The Rules authorize parties to serve requests for inspection of documents or things on each other.⁸⁵ Most commonly, parties are seeking access to the documents relevant to a dispute, and requests to inspect such documents are often referred to as "**document requests.**" If the

⁸² FED. R.CIV. P. 37(c).

⁸³ FED. R.CIV. P. 33.

⁸⁴ FED. R.CIV. P. 33(d).

⁸⁵ FED. R.CIV. P. 34.

dispute involves a defective product, a piece of land, or something else with physical existence, parties may inspect the product, property, or thing under this rule. There is no limit on the number of requests to inspect that a party may propound.

135) Like interrogatories, requests to inspect are **served** upon opposing parties but are not **filed** with the court. The recipient has two obligations: to serve a response within 30 days (although extensions of time are common); and to make the responsive, nonprivileged documents or things available for inspection. The timing constraints for document requests are different from the other discretionary discovery devices—the rules authorize early service of document requests before the parties’ discovery conference. However, the point of this provision is not to accelerate the document exchange process, but rather to identify potential problems with the document exchange process and allow the parties to address those potential problems themselves or bring them to the court’s attention. Accordingly, the response for such early document requests is not due until 30 days after the parties’ discovery conference. They must be served, at the latest, so that the response is due before the end of the discovery period. The response may include objections to the requests to inspect, but the responding party must state whether it is withholding any documents on the basis of the objections.

136) After providing the response to the requests, the responding party may either provide the requesting party with copies of responsive documents or make those documents available for inspection. The document exchange or inspection typically occurs at a mutually convenient time, but typically not at the same time as service of the response. Parties are obligated to produce all nonprivileged responsive documents in their **possession, custody, or control**. This important phrase encompasses not only the documents in the party’s files, but also: documents held by a party’s agent or affiliate, documents on remote servers or in the cloud; documents on employees’ laptops, smart phones, and personal computers; etc.

137) In terms of organizing the documents, the responding party has two choices. It may make them available for inspection organized in the manner they are ordinarily kept (*i.e.*, there is our file room, please look for yourself), or the responding party may identify the documents responsive to each request.

Practice Tip

The most common method for producing documents is to organize them by response. The responding party **bates labels** the documents (puts a uniquely identifying number on each page of each document) and informs the requesting party which documents are responsive to each request. The Rules contemplate that the responding party bears the cost of gathering the responsive documents, and the requesting party pays the copying costs. If the parties have roughly equal quantities of documents, however, they often agree that each party will pay the cost of copying its responsive documents.

c. Requests for Admission

138) The third form of written discovery is **requests for admission**, which asks an opposing party to admit or deny the matter set forth in the request.⁸⁶ Requests for admission may relate to the facts in the case, the application of the law to those facts (similar to a contention interrogatory), or the authenticity of a document (to avoid having the record custodian appear and testify to the authenticity of the document at trial). Requests for admission may be served after the parties' discovery conference, and as late as 30 days before the discovery deadline.

139) The response to a request for admission is due 30 days after service of the request. The responding party may admit the request, deny the request, or state that after reasonable investigation the responding party is unable to admit or deny the request.

140) Requests for admission are very powerful, because any matter admitted is conclusively established, and cannot be controverted at trial. Contrast this with an answer to an interrogatory or a statement in a deposition (discussed below), which may be introduced at trial, but which the party making the statement may try to explain away to the jury (*e.g.*, "I misspoke," "I was confused," "I have just now remembered ...").

Practice Tip

Any matter not denied within 30 days is deemed admitted (absent an extension of time to respond). Thus, careful attorneys will immediately calendar the due date for requests for admission so as not to inadvertently admit them.

141) A party making an admission—by failure to respond timely or by affirmative admission—may seek leave of court to withdraw the admission.⁸⁷ The judge has discretion to allow or deny the withdrawal, and will typically consider prejudice to other parties caused by the withdrawal. The sanction for an improper denial is that the party making the request may recover the costs and attorney's fees it incurred in proving the fact that was improperly denied.

d. Depositions

142) The most powerful discovery tool is the **deposition**. A deposition is a procedure where a party or witness is required to appear to be questioned orally by the attorneys for the parties.⁸⁸ The entire procedure is captured by one means or another—sometimes by stenographer or **court reporter** and sometimes by videographer. Parties may take depositions any time between the parties' discovery conference and the end of discovery. Expert depositions often occur in a separate phase after the completion of fact discovery.

143) The reason that depositions are so powerful is that they are often an attorney's only opportunity to speak directly with an opposing party, without filtering by the party's attorney (as occurs with interrogatories). Depositions are initiated by service of a **notice of deposition**, a simple form that identifies: the witness; the date, time, and location of the deposition; and the manner of

⁸⁶ FED. R.CIV. P. 36.

⁸⁷ FED. R.CIV. P. 36(b).

⁸⁸ FED. R.CIV. P. 30.

recording. For nonparties, the person noticing the deposition must also serve a subpoena on the witness, as discussed below. Each side of the case is limited to ten depositions lasting up to seven hours each.

144) Questioning at a deposition proceeds much like trial. After the witness takes an oath to tell the truth, the lawyer noticing the deposition starts asking questions. The lawyer representing the witness may object to questions, but is required to do so in a non-suggestive manner (*i.e.*, a manner that does not coach the witness how to respond). The witness then generally proceeds to respond to the question even if there is an objection—the merits of the objection are not decided, if at all, until the time that a party offers the deposition testimony into the record for trial or a motion. The lawyer representing the witness may not instruct the witness not to answer a question except to protect privileged information or in other very limited circumstances.⁸⁹ The lawyer for each party, including the party being deposed, has an opportunity to ask the witness questions.

Practice Tip

Typically, the lawyer representing the witness does not ask many, or even any, questions of the witness. The reason for this is that the lawyer has other means of obtaining information or sworn testimony from that witness. For example, if the lawyer needs information, the lawyer can simply ask the witness off the record. Likewise, if the lawyer needs a statement from the witness to support or oppose a motion, the lawyer may prepare an affidavit for the witness. Thus, a lawyer typically has very little need to ask question on the record during a deposition. If, however, the witness has given misleading or inaccurate testimony, the lawyer for that witness will frequently ask questions to address such testimony (*e.g.*, “What did you mean when you testified earlier that ...”). Additionally, if the lawyer has concerns that the witness might not be available to testify at trial, the lawyer will question the witness so as to be able to use the transcript at trial.

145) A party’s ability to use a deposition transcript or recording at trial depends on the circumstances. Assuming the deposition was properly noticed, a party may always use a deposition transcript for **impeachment**. Thus, if the witness is in court testifying on the witness stand and makes a statement that is inconsistent with the witness’s testimony at the deposition, a lawyer may ask the witness about the prior deposition testimony, casting some doubt as to the witness’s credibility. If the witness is a party or is unavailable (dead, ill, outside the court’s subpoena power, etc.), however, the deposition transcript may be used as substantive evidence—to help prove a fact relevant to a claim or defense in the case—as well as for impeachment.⁹⁰

1. Depositions of Organizations

146) When a party is a corporation or other large entity, it can be difficult to find the right witness to testify about a topic. Rule 30(b)(6) provides a very important tool to address this uncertainty.⁹¹ Rather than serving a deposition notice for a particular individual, a party may serve a

⁸⁹ FED. R.CIV. P. 30(c)(2).

⁹⁰ FED. R.CIV. P. 32.

⁹¹ FED. R.CIV. P. 30(b)(6).

Rule 30(b)(6) notice on the corporation, with a list of the topics about which the serving party wishes to ask questions. The corporation must then designate a person or persons to testify as to the topics. That person then testifies not to his or her own personal knowledge, but to the collective knowledge of the entire corporation. If no person already has that collective knowledge, the corporation must educate the representative, having him or her review documents and interview other people so as to be prepared to provide the collective information held by the corporation. The representative's testimony is then binding on the corporation.

e. Physical or Mental Examinations

147) The least frequently used discretionary discovery device is the provision allowing a party to arrange for an examination of another party's physical or mental condition, when that condition is "in controversy."⁹² Thus, if the plaintiff is claiming a back injury, the defendant would be able to arrange for a doctor to examine the plaintiff's back.

148) Unlike the other discovery devices, examinations of another party require a motion and court order, not a simple request. However, when the examination is plainly appropriate, parties often arrange the examination by stipulation.

f. Duty to Supplement

149) The Rules create an ongoing duty to supplement disclosures and discovery responses.⁹³ This duty not only extends to a response that the party subsequently learns was incorrect at the time it was made, but also to a response that was correct at the time but has subsequently become incorrect or incomplete.

g. Discovery of Nonparties

150) Parties are required to respond to interrogatories or document requests and are required to appear when served with a deposition notice. Nonparties are not bound by such papers, however, and may only be compelled to participate in discovery by **subpoena**.⁹⁴ A subpoena is a form of process like a summons, and must be served in the same manner—such as personal or abode service—as discussed above.

151) Subpoenas are limited to two activities: producing documents and appearing for testimony. In other words, a party may not use a subpoena to obtain answers to interrogatories or requests for admission. The location of performance of the subpoena is controlled by the witness's location, not the location of the action. Thus, for example, a witness will be required to produce documents or appear and testify within 100 miles of the witness's home or workplace, which might be quite distant from the courthouse where the case is pending.

h. Discovery Enforcement

152) Rule 37 contains the primary provisions for enforcing discovery obligations.⁹⁵ If a party is not satisfying its discovery obligations, an opposing party may seek an order compelling

⁹² FED. R.CIV. P. 35.

⁹³ FED. R.CIV. P. 26(e).

⁹⁴ FED. R.CIV. P. 45.

⁹⁵ FED. R.CIV. P. 37.

performance of those obligations.⁹⁶ Before filing a motion to compel, however, a party must **meet and confer** with the recalcitrant party to try to resolve the dispute without court involvement. This meet and confer requirement is a regular component of the discovery dispute process. If the meet and confer is unsuccessful, the party may file a motion to compel. The judge has broad discretion when ruling on a motion to compel (and indeed throughout the discovery process). The prevailing party will be entitled to recover the attorney's fees it incurred in connection with the motion. The recovery of attorney's fees for the prevailing party is another common theme of the discovery dispute process.

153) If the recalcitrant party still fails to comply after the court has issued an order compelling performance, the party seeking compliance may file a motion for sanctions. Available sanctions include precluding the recalcitrant party from offering evidence on affected issues, deeming certain facts established, or even as a last resort deciding the entire case against the recalcitrant party.⁹⁷

154) Some discovery conduct results in automatic sanctions or consequences, without the need to seek a motion to compel first. For example, if a party fails to appear for its deposition after proper notice, the party is immediately subject to sanctions.⁹⁸ Likewise, the sanction for failing to respond to requests for admission is that the requests are automatically deemed admitted.⁹⁹

155) The other source of sanctioning authority for discovery transgressions is Rule 26(g), which contains a signature requirement similar to that found in Rule 11 for other court papers.¹⁰⁰ An attorney signing a discovery request, response, or disclosure certifies to the court that it is well grounded in fact and law and not made for an improper purpose such as harassment, delay, or causing expense to another party.

F. Dismissals and Summary Judgment

156) Fewer than two percent of the cases filed in federal court proceed all the way through trial. The majority that survive an early motion to dismiss under Rule 12 are resolved through dismissal (often as part of a settlement) or by motion for summary judgment. This section discusses both.

I. Dismissals

a. Voluntary Dismissals

157) A plaintiff has a limited right to voluntarily dismiss the action the plaintiff has commenced. Sometimes, the plaintiff realizes almost immediately that there are serious flaws in the case, and the plaintiff decides not to continue. A plaintiff may voluntarily dismiss a case unilaterally, simply by filing a notice and without court involvement or approval or the consent of the defendant, as long as the defendant has not yet filed an answer or motion for summary judgment.¹⁰¹

⁹⁶ FED. R.CIV. P. 37(a).

⁹⁷ FED. R.CIV. P. 37(b).

⁹⁸ FED. R.CIV. P. 37(d).

⁹⁹ FED. R.CIV. P. 37(c)(2).

¹⁰⁰ FED. R.CIV. P. 26(g).

¹⁰¹ FED. R.CIV. P. 41(a)(1)(A)(i).

158) Voluntary dismissal is most common, however, following settlement. The parties do so by stipulation, again obviating the need for court approval.¹⁰²

Practice Tip

Although court approval is not required for a stipulated dismissal following settlement, such a dismissal ends the court's jurisdiction over the dispute. Parties that want the court to retain the ability to enforce the terms of the settlement agreement often file a motion for voluntary dismissal, along with a proposed stipulated order that states that the court retains jurisdiction to enforce the settlement agreement. If the court enters such an order, the parties can return to the court and ask the judge to enforce the order, without the need to commence an entirely new action for breach of the settlement agreement.

159) A plaintiff wishing to dismiss an action after the time for dismissal as of right must file a motion to dismiss if the defendant will not stipulate to dismissal. The court has discretion to grant the motion, and may impose conditions on the dismissal such as payment of fees that the defendant has incurred.¹⁰³

b. Involuntary Dismissals

160) A defendant may also file a motion for involuntary dismissal in limited circumstances. If the plaintiff has failed to prosecute the case—failed to do the things required to advance the case toward trial or resolution—or has failed to obey the Federal Rules of Civil Procedure or court orders, the court may grant an **involuntary dismissal** against the wishes of the plaintiff.¹⁰⁴ Such dismissals are not common.

II. Summary Judgment

161) The purpose of a trial is to resolve disputes of fact, primarily through hearing conflicting testimony from witnesses and assessing their credibility. The judge determines the applicable law based on legal precedent, without the need to hear witness testimony. Accordingly, trial is only necessary when the facts are in dispute—if the facts are not disputed, then the court can determine the outcome without the need for a trial.

162) The procedure for asking the judge to adjudicate the case without trial is called **summary judgment**. The court will grant summary judgment when there is no **genuine dispute as to any material fact** and the moving party is entitled to judgment as a matter of law.¹⁰⁵ Both plaintiffs and defendants may seek summary judgment, and may do so as to the entire case, single claims or defenses, or even individual facts.

163) In contrast to motions to dismiss under Rule 12, which are primarily based on allegations in the pleadings, motions for summary judgment are based on record evidence. Thus, a party seeking or opposing summary judgment may not rely on allegations in the pleadings or

¹⁰² FED. R.CIV. P. 41(a)(1)(A)(ii).

¹⁰³ FED. R.CIV. P. 41(a)(2).

¹⁰⁴ FED. R.CIV. P. 41(b).

¹⁰⁵ FED. R.CIV. P. 56(a).

assertions in a brief, but instead must submit documents, affidavits, deposition testimony, or other like evidence for the court's consideration. A party may also base a motion for summary judgment on the opposing party's lack of record evidence—essentially arguing to the court that the plaintiff cannot prove its case or the defendant cannot prove its defense. The party who will have the burden of proof at trial must then come forward with sufficient evidence that, if believed by the jury or judge, would enable the party to win.¹⁰⁶

164) For example, if a plaintiff filed an action for breach of contract, the plaintiff would have to prove that the parties formed a contract in order to prevail at trial. A defendant could move for summary judgment without submitting any record evidence by arguing that the plaintiff has no evidence that the parties ever formed a contract. To avoid summary judgment, the plaintiff would need to provide record evidence of contract formation, such as by submitting a contractual document or by submitting an affidavit or deposition testimony attesting to the formation of the contract.

165) When reviewing summary judgment papers, the court will construe all disputed evidence in favor of the non-moving party, and will draw inferences from such evidence in favor of the non-moving party.¹⁰⁷ To create a genuine dispute of fact, the non-moving party must submit more than “a mere scintilla” of evidence—the non-moving party must submit enough evidence to support a jury verdict in the non-moving party's favor.¹⁰⁸

G. Trial

166) Only about 1.2% of the cases filed in federal courts make it all the way through trial, so trial has become an unusual occurrence for most federal litigators. For those cases that do proceed to trial, there are two primary options: a jury trial, in which the jury makes the factual findings and enters a verdict; or a non-jury or bench trial, in which the judge is the fact-finder and enters a judgment.

I. Jury Trials.

a. The Right to a Jury

167) The right to a trial by jury is one of the fundamental rights of the United States civil litigation system. The right is embodied in the “**Bill of Rights**” as the **Seventh Amendment** to the **United States Constitution**, which provides:

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any court of the United States, than according to the rules of the common law.¹⁰⁹

This language does not create a new right, but rather “preserves” the right as it existed under common law in 1791, when the amendment was ratified.¹¹⁰ Thus, it may be necessary to conduct

¹⁰⁶ See *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 2552 (1986).

¹⁰⁷ See *Tolan v. Cotton*, --- U.S. ---, 134 S.Ct. 1861, 1863-66 (2014).

¹⁰⁸ See *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252, 106 S.Ct. 2505, 2512 (1986).

¹⁰⁹ U.S. Const. amend. VII.

¹¹⁰ See FED. R.CIV. P. 38(a).

historical analysis to determine whether a particular claim is subject to the right to a jury trial. The general principle, however, is relatively straightforward.

1. Claims “At Law” versus Claims “In Equity”

168) The basic distinction governing the analysis of the right to a jury trial is whether the claim is one that was traditionally “at law” or “in equity.” Until the Federal Rules of Civil Procedure were enacted in 1938, federal courts were divided into courts of law and courts of equity. Courts of equity adjudicated claims for equitable relief, like claims for injunctions, declaratory judgments, restitution, and accountings. Courts of law adjudicated claims for money damages, such as tort and breach of contract claims. Traditionally, courts of law used juries whereas courts of equity did not.¹¹¹

169) This distinction is a very helpful guidepost today for determining which claims include the right to a jury trial. If the claim seeks money damages, it will likely entitle the parties to a jury. If the claim seeks equitable relief, it will likely be tried by a judge.

2. Claims Not Existing in 1791

170) Many claims that parties bring in federal court in modern times did not exist in 1791, at the time the Seventh Amendment “preserved” the right to a jury trial. For example, virtually all claims based on federal statutes, such as federal civil rights claims¹¹² did not exist in 1791. For such claims, it is not possible to determine whether they would have been tried to a judge or jury in 1791.

171) The Supreme Court has developed an analysis to evaluate such claims for a jury right. Courts will determine the common law claim from 1791 most analogous to the statutory claim, and will also consider whether the relief sought is more like money damages or equitable relief. If the analogous 1791 common law claim afforded the parties a right to a jury trial, the new statutory claim is more likely to provide the same right. Likewise, if the relief is more like money damages, the statutory claim is more likely to provide a right to a jury trial.¹¹³

3. Complaints with Legal and Equitable Claims

172) Sometimes, a complaint contains multiple claims, some of which include a right to a jury trial, and some of which do not. In that instance, the court will **bifurcate** the case into two phases, and will have the jury hear the jury trial issues first, then the judge will hear the remaining claims second. This order is important, because the opposite order might result in the judge making factual findings that affect the jury trial claims, effectively depriving the parties of their right to have those claims fully heard by a jury.

b. Procedure for Asserting the Right to a Jury

173) Both plaintiffs and defendants have the right to a jury trial. Parties assert this right by making a **demand** for a jury trial. The demand must be in writing and both served on all other

¹¹¹ The reason for this historical distinction was the notion that equitable remedies like injunctions—orders that a party take or refrain from taking certain actions—are more intrusive and potentially require more ongoing enforcement. For these reasons, it was perceived to be more appropriate to have a judge oversee equitable remedies.

¹¹² See 42 U.S.C.A. § 1983.

¹¹³ See *Chauffeurs, Teamsters and Helpers, Local No. 391 v. Terry*, 494 U.S. 558, 565, 110 S.Ct. 1339, 1345 (1990). Of these two factors, the nature of the relief sought carries more weight in the analysis.

parties and filed with the court.¹¹⁴ It may be a separate stand-alone document, but most typically is simply a statement on the complaint or answer that might read, “A trial by jury is demanded as to all claims.” The demand must be served no later than 14 days after the last pleading directed to the issue (typically, the answer). Parties waive their right to a jury trial by failing to make a timely demand.

174) Once one party has demanded a jury trial, all other parties are entitled to rely on that demand. Thus, if the plaintiff serves and files a jury trial demand, the defendant does not need to file its own demand. Accordingly, once a party has made a jury trial demand, it may not unilaterally withdraw the demand, and instead needs consent of all parties.¹¹⁵

c. Selection and Composition of a Jury

175) Civil juries consist of between six and 12 members.¹¹⁶ The court clerk will call in a **venire panel**—a group of potential jurors from which the jury will ultimately be selected. The lawyers then participate in **voir dire**—a process in which the potential members of the jury provide information through questionnaires and oral questioning by the judge or the lawyers designed to provide some background information about the potential jurors and to uncover any connection with the parties or other sources of bias.

176) After voir dire is completed, the lawyers have opportunities to ask that certain potential jurors be struck from the panel. If jurors have a connection with the parties, lawyers, or the case, or otherwise evidence significant bias, the judge may strike them **for cause**. In addition, each side may exercise three **peremptory strikes**—strikes that the party may exercise with cause or explaining its reasoning.¹¹⁷ At the completion of the process of striking potential jurors, the judge will impanel the jury from the remaining jurors.

d. The Trial

177) Most federal courtrooms have similar configurations. The **bench**, where the judge sits, is typically an elevated area in the front of the courtroom. Right below the bench is another row of seating for the **court reporter**—the stenographer who records the proceedings—and the judge’s staff or law clerks—lawyers who assist the judge. Next to or near the bench is the **witness stand**, a chair in a partitioned area where the witnesses sit while testifying. Near the witness stand is a **podium**, where lawyers may, and in some courtrooms must, stand while questioning witnesses. Off to one side, typically near the witness stand, is the **jury box**, a partitioned area where the jury sits during the trial. Behind the podium are **counsel tables**, two tables where the lawyers and parties or party representative sit during trial. Generally, the plaintiff sits at the table closest to the jury. Finally, at the back of the courtroom is the **gallery**, where the public and other interested persons may sit and observe—unless sealed by the judge, most trials and court proceedings are open to the public.

¹¹⁴ FED. R.CIV. P. 38(b).

¹¹⁵ FED. R.CIV. P. 38(d).

¹¹⁶ FED. R.CIV. P. 48(a). The judge will set the number of jurors, taking into account the length and complexity of the trial.

¹¹⁷ FED. R.CIV. P. 47(b); 28 U.S.C.A. § 1870. Although parties may exercise their peremptory strikes for almost any reason or for no articulated reason, they may not strike jurors based on race or gender. See *Edmonson v. Leesville Concrete Co., Inc.*, 500 U.S. 614, 616, 111 S.Ct. 2077, 2080 (1991) (race); *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 129, 114 S.Ct. 1419, 1421 (1994) (gender).

178) After some opening remarks by the judge, including instructions to the jurors about how to conduct themselves during trial, the trial begins with an **opening statement** by the plaintiff's lawyer. The purpose of the opening statement is to orient the jury to the case that the plaintiff hopes to prove during trial. The defendant's lawyer may make an opening statement immediately following the plaintiff's statement, or may defer until the plaintiff has finished putting on its evidence.

179) The plaintiff then calls its witnesses and moves its evidence into the record. For each witness the plaintiff calls, the plaintiff's lawyer first conducts **direct examination**. Generally, during direct examination, the lawyer must ask open-ended questions, not **leading questions**.¹¹⁸ The defendant may object to the questions. As with deposition testimony, objections should be stated in a non-suggestive manner. If a party objects to a question, the judge will **sustain** or **overrule** the objection, sometimes conducting a **sidebar** conference out of the jury's hearing if the judge would like to hear the parties' positions regarding the objection.

180) The opposing party then **cross-examines** the witness, and may use leading questions. During cross-examination, a lawyer may try to **impeach** the credibility of the witness as well as draw out additional facts. The scope of the cross-examination is generally limited to the topics that were raised on direct examination. Following cross-examination, the party originally calling the witness may conduct **redirect examination**. Redirect examination is limited to **rehabilitating** the witness's credibility and responding to the new facts elicited during cross-examination. Some judges limit examination to these three rounds, but others allow further questioning.

181) The plaintiff must also move its exhibits—documents and tangible things—into the record. Documents are often moved into the record after a witness has testified as to their authenticity and their significance in the dispute. Documents may also be moved into the record without supporting witness testimony if the parties have stipulated to their authenticity or the court takes **judicial notice** of them (such as with public records). If the plaintiff is introducing deposition testimony as substantive evidence and the witness is not present, the plaintiff may essentially reenact the testimony for the jury, having someone sit in the witness stand and pretend to be the witness.

182) When the plaintiff finishes putting in its evidence, it **rests**. The defendant often moves for **judgment as a matter of law** at this time.¹¹⁹ A motion for judgment as a matter of law, or **JMOL**, asserts that the plaintiff has failed to introduce sufficient evidence to support its claims. The standard is similar to the standard for summary judgment, discussed above.

Practice Tip

The Rules provide that, if the judge does not grant a motion for judgment as a matter of law, the judge is deemed to have submitted the case to the jury subject to the judge's right to reconsider the motion at the end of the case.¹²⁰ Judges frequently take advantage of this provision, allowing the

¹¹⁸ A leading question is one that suggests the answer. Thus, for example, "Did you arrive home around 10:00 p.m.?" is a leading question. A nonleading alternative might be, "At about what time did you arrive home?"

¹¹⁹ FED. R.CIV. P. 50(a).

¹²⁰ FED. R.CIV. P. 50(b).

jury to reach its verdict, then entering judgment notwithstanding the verdict if the judge believes the verdict is not reasonably supported by the evidence. In that manner, if the case is appealed and the appellate court determines that the judge was wrong, there is no need for a new trial. Even though these motions are most frequently denied, however, it is important to make them because parties may waive their right to appeal for issues not properly raised in a Rule 50 motion.¹²¹

183) After the plaintiff rests, the defendant puts its evidence into the record. Questioning proceeds in parallel to the process during the plaintiff's case. At the conclusion of the defendant's case, the plaintiff may move for judgment as a matter of law, arguing that the defendant has failed to prove its defenses (but such motions are not as common). The plaintiff then has another opportunity to offer evidence designed to rebut the evidence introduced during the defendant's case.

184) Once all the evidence is in the record, the judge provides **jury instructions** or a **jury charge** to the jury. The jury charge is a description of the legal principles that govern the dispute. The idea is that the jury will determine the facts and apply the law, as described by the judge, to those facts. Before giving the jury charge, the judge will invite the parties to submit proposed jury instructions. The judge will then craft the jury charge from the parties' submissions and its own resources. The judge must then provide the parties with an opportunity to object to the charge before the judge reads it to the jury. The parties waive any objections not raised during this opportunity.¹²²

Practice Tip

Most jurisdictions have books of **model jury instructions**—instructions that courts have found to be accurate and appropriate. Model jury instructions are an important resource when drafting proposed jury instructions.

185) After the judge charges the jury, the jury retires to the **jury room** to **deliberate**. They start by picking a **foreman**, the person who will organize the jury deliberations and communicate with the judge if issues arise during the deliberations. The jury then discusses the case until they reach a **verdict**. Verdicts must be unanimous, unless the parties stipulate otherwise.¹²³

186) Jury verdicts can come in a variety of forms. The simplest form is the **general verdict**, which generally allows the jury to either check a box indicating that they find in favor of the defendant or check a box indicating that they find in favor of the plaintiff, specifying the amount of damages. **Special verdicts** contain a series of questions for the jury to answer, such as "do you find that the parties entered into a contract?" and "do you find that the defendant breached the contract?" The judge can then enter the appropriate judgment based on the jury's answers to the questions. **General verdicts with interrogatories** combine the two approaches.¹²⁴

¹²¹ *Unitherm Food Systems, Inc. v. Swift-Eckrich, Inc.*, 546 U.S. 394, 126 S.Ct. 980, 987 (2006).

¹²² FED. R.CIV. P. 51(d).

¹²³ FED. R.CIV. P. 48(b).

¹²⁴ See FED. R.CIV. P. 49.

187) Once the jury reaches its verdict, the foreman alerts the judge. The lawyers reassemble in the courtroom, and the jury returns to the jury box. The foreman hands the verdict to the judge, who reads it aloud. The parties may ask that the judge **poll** the jury—asking each member individually if they joined in the verdict to ensure that it was unanimous.¹²⁵ The judge then **discharges** the jury.

188) The jury verdict is not, on its own, enforceable. Rather, the judge must enter a judgment in the docket.¹²⁶ The entry of a judgment is the event that allows a successful plaintiff to collect its damages.

II. Non-Jury Trials

189) Non-jury trials proceed much like jury trials, except the judge is the fact finder and the proceedings are more streamlined. Judges frequently allow more leading questions in non-jury trials and are laxer regarding the rules of evidence—reasoning that these rules are designed to prevent confusion or prejudice to the jury but are unnecessary with a sophisticated judge. Deposition testimony is simply submitted in writing rather than read aloud, and sometimes direct testimony is submitted in writing and only cross-examination is live.

190) At the conclusion of a non-jury trial, the judge does not enter a verdict. Instead, the judge enters **findings of fact** and **conclusions of law** into the record.¹²⁷ Although the judge may enter these findings and conclusions orally, they are more typically entered in written form. The judge often asks the parties to submit **proposed findings of fact and conclusions of law**, and then drafts her own findings and conclusions using the parties' submissions as a resource.

a. Advisory Juries

191) For claims where the parties are not entitled to a jury, the court may try the claim with an **advisory jury**.¹²⁸ When the judge uses an advisory jury, the jury deliberates like a normal jury, but the judge is not obligated to follow the jury's verdict.

H. Post-Trial Remedies

192) After trial has concluded and the judge has entered judgment, the parties have limited options for asking the judge to reconsider or alter the judgment.

I. Renewed Motion for Judgment as a Matter of Law

193) In the immediate aftermath of the trial, the parties may renew the motions for judgment as a matter of law they made during trial.¹²⁹ A renewed motion for judgment as a matter of law must be filed within 28 days after the entry of judgment, and is a prerequisite for appealing the issues that might be raised in such a motion. The standard is the same as for the original motion (or a summary judgment motion), but is an opportunity for the judge to consider the motion again after all the evidence is in.

¹²⁵ FED. R.CIV. P. 48(c).

¹²⁶ See FED. R.CIV. P. 54.

¹²⁷ FED. R.CIV. P. 52(a).

¹²⁸ FED. R.CIV. P. 39(c).

¹²⁹ FED. R.CIV. P. 50(b).

II. Motion for a New Trial

194) Additionally, parties may seek a new trial.¹³⁰ A motion for a new trial must be filed within 28 days after the entry of judgment, and is often filed in combination with, and in the alternative to, the renewed motion for judgment as a matter of law. In general, a court will grant a new trial in order to prevent a miscarriage of justice.¹³¹

III. Motion for Relief from a Judgment

195) Finally, a party may ask the court to amend or strike a judgment based on changed circumstances or other extraordinary issues of fundamental fairness.¹³² Common grounds for seeking relief from a final judgment include: mistake; excusable neglect; newly discovered evidence that, with reasonable diligence, could not have been discovered earlier; and the catch-all “any other reason that justifies relief.”¹³³

196) There is no set time limit for a request for relief from a final judgment, except that certain of the grounds must be asserted within one year of the entry of the judgment.¹³⁴ Relief under Rule 60 is viewed as extraordinary, and is not frequently granted.

I. Appeal

197) Tremendous inefficiencies and delays would result if parties could appeal each interlocutory order in the case that did not favor them. Accordingly, with a few exceptions discussed below, a party may only appeal from a **final judgment** or **final order**, one that disposes of all claims in the case. Although this chapter focuses on federal civil litigation at the trial level, this section provides a brief overview of the appellate process.

198) A party initiates an appeal by filing a **notice of appeal** within 30 days after the entry of the final judgment or order.¹³⁵ The notice of appeal is a simple form that identifies the orders that are being appealed, but does not describe the specific issues to be raised in the appeal. The parties then have an opportunity to designate the **record on appeal**, the documents that the parties want to be available to the appellate court during its review. Once the record is set, the court sets a **briefing schedule**. Appellate briefs are more tightly constrained than most trial court briefs, with detailed requirements for each section of the brief.

199) The court then sets a date, time, and location for oral argument. Most oral arguments for appeals are conducted before a panel of three judges, with the outcome determined by a majority of the judges. Arguments typically have a time limit, split equally between the parties, which the panel strictly enforces. The **appellant**—the party bringing the appeal—argues first, and may reserve a portion of its time for rebuttal. In a half-hour argument, the appellant might reserve two of its 15 minutes for rebuttal. The **appellee** argues second, and may not reserve time for any further rounds.

¹³⁰ FED. R.CIV. P. 59.

¹³¹ See *Michigan Millers Mut. Ins. Co. v. Asoyia, Inc.*, 793 F.3d 872, 878 (8th Cir. 2015).

¹³² FED. R.CIV. P. 60(b).

¹³³ FED. R.CIV. P. 60(b)(1)-(6).

¹³⁴ FED. R.CIV. P. 60(c).

¹³⁵ Be aware that certain post-trial motions stay the period for appeal. See FED. R. APP. P. 4(a)(4)(A).

200) In limited circumstances, a party may bring an **interlocutory appeal** of a non-final order. Parties have a right to an interlocutory appeal of certain interlocutory orders specified by statute, most importantly interlocutory orders granting, continuing, modifying, refusing, or dissolving injunctions.¹³⁶ For other orders, parties may request interlocutory appeal but it is a two-step, difficult process. First, a lawyer seeking interlocutory appeal must persuade the trial judge of three things: 1) that the issue to be appealed involves a “controlling question of law” which can be resolved “quickly and cleanly,” the resolution of which is likely to affect the future course of the litigation; 2) there is substantial ground for difference of opinion on the legal question; and 3) an immediate appeal may “materially advance” the termination of the litigation.¹³⁷ Second, the court of appeals must agree that it will hear the interlocutory appeal. Both of these determinations are discretionary; satisfaction of the requirements does not guarantee an interlocutory appeal.

201) It is important to understand that an appeal does not render the judgment unenforceable. This limitation is particularly important for defendants who have lost. In order to prevent the plaintiff from enforcing a judgment, an appealing defendant must post a **supersedeas bond**—security that the plaintiff may use to satisfy the judgment if the defendant’s appeal is ultimately unsuccessful.

J. Collection

202) Obtaining a favorable judgment signals a victory for the plaintiff, of course, but a judgment is a piece of paper that the plaintiff cannot spend. Defendants with sufficient assets will typically pay, or **satisfy**, judgments against them. For those defendants who cannot, or will not, satisfy a judgment voluntarily, plaintiffs must employ a process called “**collection**.”

203) Plaintiffs have a number of tools to locate and obtain assets to satisfy a judgment. The process often starts with **discovery in aid of execution**.¹³⁸ The plaintiff may send interrogatories or document requests asking the defendant to identify bank accounts and other real and tangible property. The plaintiff may also require the defendant to appear for a deposition to inquire about the nature and location of such assets. Informal discovery, like title searches, may lead to additional information. Once the plaintiff has identified assets, the plaintiff may **attach** money in bank accounts, **garnish** a portion of the defendant’s wages, and have the U.S. Marshals auction the defendant’s property.

K. Finality

204) The final concept for this chapter describes the doctrines the courts have developed to prevent a disappointed party from trying to relitigate matters the party already lost. There are separate, but very similar, doctrines addressing the finality of litigation resolving disputed claims and individual issues.

I. Claim Preclusion or *Res Judicata*

¹³⁶ 28 U.S.C.A. § 1292(a).

¹³⁷ 28 U.S.C.A. § 1292(b).

¹³⁸ FED. R.CIV. P. 69(a)(2).

205) The first of these doctrines precludes the relitigation of entire claims. This doctrine was referred to as “*res judicata*” for many years, but is now more commonly referred to as “**claim preclusion**.”

206) Claim preclusion prevents the same parties from litigating the same claim a second time, and has the following elements: 1) a prior claim that was fully adjudicated on the merits; 2) the current action involves the same claim as the prior action; and 3) the parties in the second action are the same as, or **in privity**¹³⁹ with, the parties in the first action.

II. Issue Preclusion or Collateral Estoppel

207) The second of these doctrines precludes the relitigation of specific issues. This doctrine was referred to as “**collateral estoppel**” for many years, but is now more commonly referred to as “**issue preclusion**.”

208) Issue preclusion prevents a party that has lost an issue from litigating the same issue a second time, and has the following elements: 1) a prior issue that was actually litigated and decided; 2) the current action involves the same issue as the prior action; 3) the party against whom preclusion is sought was a party in the first action or in privity with a party in the first action who had adequate incentive to contest the issue; and 4) the determination of the issue in the earlier case was essential to the judgment in that case.

209) Courts have further divided issue preclusion into two categories: **defensive issue preclusion** and **offensive issue preclusion**. Defensive issue preclusion describes the situation when a defendant seeks to use issue preclusion to block a claim against it.¹⁴⁰ For example, assume a plaintiff is injured by a lawnmower and brings a products liability claim against the manufacturer of the lawnmower. Further assume that one of the elements of the products liability claim is that the plaintiff had been using the product in its intended manner. At trial, the jury returned a special verdict that included a finding that the plaintiff had not been using the lawnmower in its intended manner. If that same plaintiff sought to bring a products liability claim against the manufacturer of the lawnmower blade, that manufacturer could assert defensive issue preclusion. Based on these facts, the plaintiff would likely be precluded from contending that they had been using the lawnmower in its intended manner (and thus could not pursue the claim against the blade manufacturer).

210) In contrast, offensive issue preclusion describes the situation when a plaintiff seeks to use issue preclusion to establish a claim against the defendant. Using the above example, suppose in the first action, the jury’s special verdict also included a finding that the lawnmower was defectively designed. Another plaintiff injured by the same model lawnmower might bring an action against the manufacturer and use issue preclusion to assert that the manufacturer should be precluded or estopped from contending that the lawnmower was not defectively designed.

211) While such an assertion meets the elements of issue preclusion, the courts have recognized a particular risk with offensive issue preclusion. Suppose 100 individuals were injured by

¹³⁹ “Privity” requires a close relationship between the parties. Thus, for example, a parent and subsidiary corporation will be deemed to be in privity with each other. If the subsidiary loses a claim in litigation, the parent corporation would likely not be permitted to bring the same claim against the same defendant.

¹⁴⁰ See *Parklane Hosiery Company, Inc. v. Shore*, 439 U.S. 322, 329, 99 S.Ct. 645, 650 (1979).

the model lawnmower in question. Suppose in the first 24 lawsuits, the jury returned a special verdict with a finding that the lawnmower was not defectively designed, but in the 25th lawsuit, the jury found that the lawnmower was defectively designed. Unfettered offensive issue preclusion would allow the next 75 plaintiffs to prevail on the issue of defective design, despite the fact that 96% of the juries had reached the opposite conclusion. Such a result would be manifestly unfair to the defendant. Accordingly, the courts have discretion as to whether to apply offensive issue preclusion.¹⁴¹

¹⁴¹ See *Parklane Hosiery Company, Inc. v. Shore*, 439 U.S. 322, 331-32, 99 S.Ct. 645, 651-52 (1979).