

Civil Procedure (Excerpt)

I. Introduction

- a. Distinction between substance and procedure
 - i. **Sibbach v. Wilson & Co.**
 1. Court justifies its own Federal Rules as only regulating “procedure” and not “substance”, as required by the Rules Enabling Act, which gives Court power to make rules regulating procedure, BUT not abridging substantive rights
 - a. Rules 35 and 37
 - b. “substantive” rules control daily lives
 - c. “substantive” is not the same as “substantial”
 - d. Note—There is overlap
 - e. The Test must be whether a rule *really* regulated procedure

II. Phases of Litigation

a. Complaint

- i. Action commenced by filing a claim – Rule 3, Rule 8, Form 9
- ii. A “case” arises from the same “transaction or occurrence”.
 1. Must state jurisdiction 8(a)(1)
 2. Must state the claim 8(a)(2) “short/plain statement”; 8(e)(1) “simple, concise, direct” (must state rule of law case is based on so D has ability to make a defense based on the issues raised)
 - a. **Sierocinski v. E.I. Du Pont De Nemours & Co.** (p. 37)
 - i. “A plaintiff need not plead evidence.”
 - ii. Claiming “negligence” is sufficient to satisfy Rule 8(a)(2) – simplicity and brevity as shown in Form 9
 - b. **Conley v. Gibson** (p. 38)
 - i. “[a] complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.”
 - ii. Purpose of pleading is to put D on notice
 - c. **Kirksey v. R.J. Reynolds Tobacco Co.** (p. 39)
 - i. Stating a claim properly is not enough if the claim alleged is not one for which relief can be granted. “Form” was right, but no substance.
 - d. **Murphy v. Cuomo** (p. 42)
 - i. Although the complaint can be general, court grants summary judgment for defendant when, after discovery is complete, plaintiff still has no evidence.
 - ii. Law does not require proof of case during discovery, but complaint must be based on more than pure speculation/fantasy
 - iii. Rule 11—Representations to the Courts
 - Does not require a finding of bad faith
 - Atty. Must make reasonable inquiry to make sure claims are well-grounded in both fact/law
 - P’s atty is “gatekeeper”
 - Purpose is to deter abusive litigation tactics and avoid frivolous lawsuits
 3. Claims in the alternative 8(e)(2); 18
 - P may set forth two or more statements alternately or hypothetically, either in one count or two separate counts

- Purpose is to aid P who may be uncertain about facts or substantive law
 - Subject to Rule 11 (consistency and truth in pleading)
4. Must state demand for judgment 8(a)(3)
- b. **Defenses and Objections** – Rule 8, Rule 12, Form 19, Form 20
- i. **Rule 12(e) Motion for More Definite Statement**
 - ii. **Rule 12(f) Motion to Strike**
 - Court may strike redundant, scandalous statement
 - iii. **Dismissals under Rule 12(b)**
 1. All defenses to a claim can be made in D’s answer (Rule 7a)
 2. **Rule 12(g) Consolidation**—D will consolidate defenses in initial motion or he risks losing them
 - Cant raise one issue by motion and later raise a second issue by motion
 3. These 7 can be made by motion before pleading (i.e. pre-answer motions)
 - a. Decided by pre-trial hearing whether raised in motion/answer
 - b. If granted, defendant doesn’t have to file an answer
 - c. These seven are special by history and tradition
 - d. Three categories:

Support?	Which Rules?	Why?
Disfavored – 12(h)(1) If omitted from a pre-answer motion and not included in a responsive pleading or an amendment thereof, the defense is waived.	12(b)(2) - personal jurisdiction 12(b)(3) - improper venue 12(b)(4) - insufficiency of process 12(b)(5) - insufficiency of service of process	They are minor annoyances, and should be obvious immediately. Also, they are highly curable.
Preserved – 12(h)(2) If omitted from a pre-answer motion it cannot be raised until the answer, but it can be raised at the trial on the merits. Cant be raised after trial on the merits	12(b)(6) - failure to state a claim 12(b)(7) - failure to join a party	May become relevant only after discovery, so they are preserved that they might be available when they become relevant.
Encouraged – 12(h)(3) It may be raised at any time. If not suggested by either party, it should be brought up by the court.	12(b)(1) - subject matter jurisdiction	Involves a fundamental issue of federal / state jurisdiction.

iv. **Defenses under Rule 8**

1. **Denials of facts alleged by plaintiff** – 8(b)
 - a. Any facts not denied are admitted as true – 8(d)
 - b. Denials may be general or specific, but must be in good faith – 8(b)
2. **Assertions of new facts – affirmative defenses** – 8(c)
 - a. Must be raised in an answer or an amendment thereof, or they are lost
3. **Coleman v. Frierson** (p. 51)
 - a. After judgment by default against him, the defendant files three relevant motions:

- i. Plaintiff's claims barred by res judicata – 8(c)
 1. rejected, because affirmative defenses must be raised in the answer or in an amendment thereto.
- ii. Failure to state a claim – 12(b)(6)
 1. rejected, because the last time that can be raised is “at trial on the merits”, i.e. before the jury leaves to deliberate.
- iii. Defendant tries to raise new relevant evidence –
 1. rejected, because Rule 60(b) states the very limited instances in which new information can be raised after the trial.
 2. **This is to discourage attorneys from holding back evidence. Consider the impact if the jury was brought back from deliberations to hear a new piece of evidence for one side.**

***Compare the respective burdens of the plaintiff and defendant in pleadings. Plaintiff must simply state facts that *could* prove a claim. Defendant must be very specific. This rejects old theory that bad answer is good enough for bad complaint. No real reasons for disparity. Could say defendant has bigger burden simply because he's 2nd.

*** Also, the plaintiff is neither required NOR PERMITTED to respond to the defendant's defenses. ***

- Replies to defenses are neither required nor permitted – **Rule 7(a)**.
- P cannot respond unless instructed by court to do so
- All averments in pleading to which no responsive pleading is required or permitted should be taken as denied or avoided

- c. **Counterclaims** – Rule 13, Rule 12(a)(2)
 - i. Counterclaims are treated much like a complaint
 - ii. RULE 8(d) Reply to counterclaim is mandatory
 - No response means admitted
 - Rule 55(d) Can default by not responding to counterclaim
 - iii. **Compulsory Counterclaims**
 1. Arising out of the same “transaction or occurrence” – 13(a)
 2. Must be raised in the answer to plaintiff's claim, or the right to counterclaim is waived.
 - a. Exception, with the courts approval – 13(f):
 - i. The pleader fails to counterclaim through oversight, inadvertence, or excusable neglect.
 - ii. When justice so requires.
 - b. If a plaintiff files a suit and the defendant successfully gets it dismissed by a motion for a 12(b)(6), the motion is not a pleading, so the defendant CAN later file a counterclaim stemming from the same transaction – See p. 57. Lawhorn v. Atlantic Red. Co.
 3. Often affirmative defenses become counterclaims, e.g. contributory negligence defense, and a negligence counterclaim
 - iv. **Permissive counterclaim**
 1. The defendant MAY, but is not required to, raise counterclaims based on unrelated incidents.
 2. Why would a defendant wait to raise a counterclaim?
 - a. The might want to file in a different forum
 - b. Some evidence in one action might be prejudicial in another
 - c. There might be a third party not in the jurisdiction

3. Why would a defendant raise a permissive counterclaim at the same time?
 - a. Efficiency – already has a lawyer, etc.
 - b. If there is doubt about whether or not a claim is compulsory, this preserves the defendant’s right to file the claim. The judge can always separate the claims if he sees reason to do so. (Rule 42(b))
 - v. How does one determine what is one “transaction or occurrence”?
 1. Same “cause of action”?
 - a. But the cause of action doesn’t have to be stated in the claim.
 2. Same evidence?
 - a. Clearly won’t be exactly the same. So... high overlap? What constitutes “high”?
 - b. How can one tell the extent of evidentiary overlap from the pleadings?
 3. A logical relationship?
 - a. In whose opinion? Based on what?
 4. Experientially related?
 - a. As in, when one man sues another for adultery, the latter usually sues back for libel and slander?
 - vi. **Williams v Robinson** (p. 59)
 1. Facts: Robinson sued Williams for his having an affair with Robinson’s wife. Williams did not counterclaim in his answer to the complaint, but sued Robinson separately for libel and slander. Robinson moved for dismissal under 13(a), because the claims arose from the same “transaction or occurrence,” and thus Williams waived his right to claim by not raising it in his answer to Robinson’s motion.
 2. Holding: Judge stated the evidence and facts were not the same, so they were different transactions. Narrow interpretation of 13(a).
 3. * Note: Were Robinson a “high stakes player” he would have waited for the first case to come to judgment before raising his objection Williams’ suit. *
 - vii. **Recovering on claim/counterclaim**
 1. Possible for both P to win on claim and D to win on counterclaim
 2. Judgment issued for the difference
- d. **Amending Pleadings – Rule 15**
- i. A party is allowed to amend its pleading:
 1. **Before trial—Rule 15(a)**
 - a. Once before the responsive pleading is returned, without asking the court
 - b. If there will be no responsive pleading, within 20 days after the original pleading is served.
 - c. Otherwise, only with leave of the court or written consent of the opponent.
 - i. The court should liberally allow each side to amend its pleadings – 15(b).
 - ii. Leave shall be freely given when justice so requires
 - iii. Leave is almost always granted
 2. **At trial – Rule 15(b):**
 - a. If evidence not raised in the pleadings is raised in court and not objected to, it is admitted and the pleadings may be changed.
 - i. If the pleadings are NOT changed, that does not affect the judgment of the trial on those issues.

- b. If evidence not raised in the pleadings is raised in court and IS objected to, the court should allow the evidence and rule for amended pleadings unless the new evidence would create prejudice against the objector.

ii. **Backdating – Rule 15(c)**

1. Concerning statute of limitations
2. Can backdate if the matter in the amendment arose out of the same transaction or occurrence as the original action.

iii. **Blair v. Durham** (p. 66)

1. Facts: Plaintiff/appellee Durham sued a company for negligence after she was hit on the head with a falling log. After discovery she amended her pleading with the court's permission. Defendants/appellants filed for dismissal, as the new pleading alleged negligence in construction whereas the first stated negligence from the employees for using the equipment improperly.
2. Holding: It's the same transaction, because it's an invasion of the same right and negligence of the same obligation. Broad interpretation of "transaction".